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# In the Supreme Court of the United States

OCTOBER TERM, 1976

**No. 75-1126**

TRANS WORLD AIRLINES, INC.,
*Petitioner,*

vs.

LARRY G. HARDISON, ET AL.,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF FOR PETITIONER TRANS WORLD AIRLINES, INC.

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## TABLE OF CONTENTS


Opinions Below ..... 1

Jurisdiction ..... 2

Constitutional Provision, Statutes and Guideline Involved ..... 2

Questions Presented ..... 4

Statement of the Case ..... 5

Summary of Argument ..... 19

Argument—

I. The Statutory and EEOC Guideline Requiring an Employer to Accommodate an Employee's Religious Practices Violate the Establishment Clause of the First Amendment ..... 21

A. The Statute and Guideline Lack a Primary Secular Legislative Purpose ..... 37

B. The Primary Effect of the Accommodation Requirement Is to Advance Religion ..... 40

C. The Statute and Guideline Patently Require Pervasive and Excessive Government Entanglement With Religion ..... 42

II. The Court of Appeals Imposed a Far Too Strict and Unrealistic Standard and It Violated Rule 52(a) by Trying the Case de Novo ..... 46

Conclusion ..... 61


## Table of Authorities

### CASES


*Abington School District* v. *Schempp*, 374 U.S. 203 (1963) ..... 25, 26, 28, 33, 37, 45, 46

*Allen* v. *Board of Education*, 392 U.S. 236 (1968) ..... 45

*Andrews* v. *O'Grady*, 252 N.Y.S.2d 814 (N.Y. 1964) .... 36
*Board of Education* v. *Allen*, 392 U.S. 236 (1968) ..... 27
*Braunfield* v. *Braun*, 366 U.S. 599 (1961) .....27, 32
*Claybaugh* v. *Pacific Northwest Bell Telephone Company*, 355 F. Supp. 1 (D.C. Oregon 1973) .....49, 50
*Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973) .....25, 32, 33, 37, 39, 41
*Cook* v. *Mountain States Telephone and Telegraph Company*, 397 F. Supp. 1217 (D. Ariz. 1975) ..... 57
*Cooper* v. *General Dynamics, Convair Aerospace Div.*, 533 F.2d 163 (5th Cir. 1976), *rev'g* 378 F. Supp. 1258 (D.C. Tex. 1974) .....31, 50
*Cummins* v. *Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), *aff'd* ..... U.S. ....., 50 L.Ed.2d 233 (1976) .....29, 30, 43, 51
*Dawson* v. *Mizell*, 325 F. Supp. 511 (E.D. Va. 1971) ....49, 50
*Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd* 402 U.S. 689 (1971) .....23, 43
*Dixon* v. *Omaha Public Power District*, 385 F. Supp. 1382 (D. Neb. 1974) ..... 57
*Draper* v. *U. S. Pipe & Foundry*, 527 F.2d 515 (6th Cir. 1975) .....43, 59
*Drum* v. *Ware*, 7 E.P.D. ¶ 9244 (W.D. N.C. 1974) ..... 49
*Engel* v. *Vitale*, 370 U.S. 421 (1961) .....26, 39, 45
*Epperson* v. *Arkansas*, 393 U.S. 97 (1968) .....26, 37
*Everson* v. *Board of Education*, 330 U.S. 1 (1947) ..... 25, .....40, 44, 45
*Franks* v. *Bowman Transportation Corp.*, ..... U.S. ....., 47 L.Ed.2d 444 (1976) .....24, 49
*Gillette* v. *United States*, 401 U.S. 437 (1971) .....27, 29, .....30, 31, 33, 39, 42
*Gray* v. *Gulf, M. & O.R.R.*, 429 F.2d 1064 (5th Cir. 1970), *cert. denied* 400 U.S. 1001 (1971) ..... 31



*Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) .....23, 24, .....29, 30, 39
*Hammond* v. *Papermakers Union*, 462 F.2d 174 (6th Cir.), *cert. denied* 409 U.S. 1028 (1972) ..... 31
*Hardison* v. *Trans World Airlines, Inc.*, 527 F.2d 33 (8th Cir. 1975) .....43, 59
*Hunt* v. *McNair*, 413 U.S. 734 (1973) ..... 39
*In re Eastern Greyhound Lines Division of Greyhound Lines, Incorporated* v. *New York State Division of Human Rights*, 27 N.Y.2d 279, 265 N.E.2d 745, 317 N.Y.S.2d 322, *aff'g* 34 App. Div. 2d 916, 311 N.Y.S.2d 465 (1970) ..... 36
*Meek* v. *Pittenger*, 421 U.S. 349 (1975) .....37, 39
*Johnson* v. *United States Postal Services*, 364 F. Supp. 37 (D.C. Fla. 1973), *aff'd* 497 F.2d 128 (5th Cir. 1974) .....43, 49, 50, 59
*Kettel* v. *Johnson & Johnson*, 337 F. Supp. 892 (E.D. Ark. 1972) ..... 23
*Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) ....28, 33, 37, 39, 42
*Linscott* v. *Millers Falls Co.*, 440 F.2d 14 (1st Cir.), *cert. denied* 404 U.S. 872 (1971) ..... 31
*McCollum* v. *Board of Education*, 333 U.S. 203 (1947) .....27, 45
*McGowan* v. *Maryland*, 366 U.S. 420 (1961) .....27, 29, .....32, 33, 39
*McDonald* v. *Santa Fe Transportation Company*, ..... U.S. ....., 49 L.Ed.2d 493 (1976) ..... 23
*NLRB* v. *Hershey Foods Corp.*, 513 F.2d 1083 (9th Cir. 1975) ..... 31
*Otten* v. *Baltimore & O.R.R.*, 205 F.2d 58 (2d Cir. 1953) .....30, 35
*Peony Park* v. *O'Malley*, 223 F.2d 668 (8th Cir. 1955), *cert. denied* 350 U.S. 845, *rehearing denied* 350 U.S. 898 ..... 23

*Prince* v. *Massachusetts*, 321 U.S. 158 (1944) ..... 35
*Reid* v. *Memphis Publishing Company*, 521 F.2d 512 (6th Cir. 1975), *cert. denied* November 15, 1975, No. 75-1105 ..... 23, 43, 50
*Riley* v. *Bendix Corp.*, 330 F. Supp. 583 (M.D. Fla. 1971), *rev'd* 464 F.2d 1113 (5th Cir. 1972) ..... 23, 43
*Roberts* v. *Hermitage Cotton Mills*, 8 E.P.D. ¶ 9589 (D. S.C. 1974), *aff'd* 8 E.P.D. ¶ 9597 (4th Cir. 1974) ..... 43, 50, 59
*Shaffield* v. *Northrup Worldwide Aircraft Services, Inc.*, 373 F. Supp. 937 (M.D. Ala. 1974) ..... 49
*Sherbert* v. *Verner*, 374 U.S. 398 (1963) ..... 33, 34, 36, 39
*Sloan* v. *Lemon*, 413 U.S. 825 (1973) ..... 39
*Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957) 36
*Tilton* v. *Richardson*, 403 U.S. 672 (1971) ..... 28, 39, 41
*Torasco* v. *Watkins*, 367 U.S. 488 (1961) ..... 26, 27, 39
*Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1961) ..... 27
*United States* v. *City of Albuquerque*, 9 E.P.D. ¶ 10,182 (D. N. Mex. 1975), *aff'd* ..... F.2d ....., 12 E.P.D. ¶ 11,244 (10th Cir. November 29, 1976) ..... 43, 50, 54, 57, 59, 60
*Vaca* v. *Sipes*, 306 U.S. 1 (1967) ..... 36
*Walz* v. *Tax Commissioner*, 397 U.S. 664 (1970) ..... 25, 26, 33, 39, 40, 42, 45
*Wicks* v. *Southern Pacific Co.*, 231 F.2d 130 (9th Cir.), *cert. denied* 351 U.S. 946 (1956) ..... 30-31
*Williams* v. *Southern Union Gas Co.*, 529 F.2d 483 (10th Cir. 1976), *cert. denied* November 15, 1976, No. 75-1511 ..... 43, 50
*Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) ..... 33, 34, 36
*Young* v. *Southwestern Savings & Loan*, 509 F.2d 544 (5th Cir. 1975) ..... 43



*Yott* v. *North American Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974) ..... 30, 50
*Zorach* v. *Clauson*, 343 U.S. 306 (1952) ..... 25, 28

CONSTITUTION AND STATUTES

First Amendment, Constitution of the United States ..... 2, 19, 23

Civil Rights Act of 1964, as amended—
Section 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1974) ..... 2, 3, 21, 22, 34, 37
Section 701(j), 42 U.S.C. § 2000e(j) (1974) ..... 2, 22, 31, 34, 37, 42
Section 703(h), 42 U.S.C. § 2000e-2(h) (1974) ..... 3, 17, 20, 48, 49

28 U.S.C. § 1254(1) ..... 2

REGULATIONS AND RULES

29 C.F.R. § 1605.1 (1975), EEOC Guideline 1605.1 ..... 3, 4, 22
31 Fed. Reg. 8370 ..... 22
Rule 52(a), Federal Rules of Civil Procedure ..... 4, 18, 20, 21, 46, 50

CONGRESSIONAL MATERIALS

110 Cong. Rec. 1528 (1964) ..... 37
118 Cong. Rec. 705 (1972) ..... 38, 39, 42

OTHER AUTHORITIES

*Civil Rights—Religious Discrimination In Employment —Title VII Standards of "Reasonable Accommodation" and "Undue Hardship" Are Constitutional, But Recent Cases Illustrate Judicial Overzealousness in Enforcement*, 54 Tex. L. Rev. 616 (1976) ..... 24, 51

*Constitutional Law—Establishment Clause—Sixth Circuit Questions Validity of the Reasonable Accommodation Rule*, 44 Fordham L. Rev. 442 (1975) ..... 24, 31

Edwards and Kaplan, *Religious Discrimination and the Rule of Arbitration Under Title VII*, 69 Mich. L. Rev. 599 (1971) ..... 17, 24, 36, 48

*Is Title VII's Reasonable Accommodation Requirement A Law Respecting an Establishment of Religion*, 51 Notre Dame L. Rev. 481 (1976) ..... 24, 41

Rabinowitz, "The Bias In The Government's Anti-Bias Agency", Fortune, Vol. XCIV No. 6, December, 1976 44

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*Religious Observance and Discrimination in Employment*, 22 Syracuse L. Rev. 1019 (1971) ..... 24

*Title VII—Religious Discrimination—Employer's Duty to Reasonably Accommodate Employee's Religious Practices*, 9 Creighton L. Rev. 795 ..... 24, 51

*Up Against the Accommodation Rule*, 45 U.M.K.C. L. Rev. 56 (1976) ..... 24, 39, 41, 51

U.S. Bureau of the Census, *Statistical Abstract of the United States*: 1975, Table No. 579, p. 353; Table No. 63, p. 46 (96th ed. 1975) ..... 31

Writings of James Madison 186 (Hunt ed. 1901) ..... 45

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## BRIEF FOR PETITIONER TRANS WORLD AIRLINES, INC.

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## OPINIONS BELOW

The opinion of the court of appeals (A. 246)[1] is reported at 527 F.2d 33. The opinion of the district court (A. 218) is reported at 375 F. Supp. 877.

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1. Reference to "A. ....." is to the Appendix filed in this Court. References to "Pet. ....." are to the petition for certiorari filed herein on February 9, 1976. Reference to "R. ....." is to the original record transcript in the trial court. Reference to "Tr. App. ....." is to the transcript appendix filed in the court of appeals.

## JURISDICTION

The judgment of the court of appeals was entered December 16, 1975 (A. 246). A timely petition for a writ of certiorari was filed February 9, 1976. This Court granted the writ of certiorari on November 15, 1976 (A. 4). Jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION, STATUTES AND GUIDELINE INVOLVED

The Establishment Clause of the First Amendment to the Constitution of the United States provides: "Congress shall make no law respecting an establishment of religion. . . ."

Section 703(a)(1) of the Civil Rights Act of 1964, as amended, provides:

> "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2(a)(1) (1974).

Section 701(j) of the Civil Rights Act of 1964, as amended, provides:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (1974).



Section 703(h) of the Civil Rights Act of 1964, as amended, provides:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin. * * *" 42 U.S.C. § 2000e-2(h) (1974).

Guideline 1605.1 of the United States Equal Employment Opportunity Commission ("EEOC") provides:

> "(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.
>
> (b) The Commission believes that the duty not to discriminate on religious grounds required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.
>
> (c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or

applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people." 29 C.F.R. § 1605.1 (1975).

## QUESTIONS PRESENTED

(1) Whether the 1964 Civil Rights Act's "Reasonable Accommodation—Undue Hardship" requirement violates the Establishment Clause of the First Amendment by requiring an employer to grant preferential treatment to an employee solely because of his religious practices by (a) depriving, without union consent, more senior employees (who may or may not have any religious beliefs) of their seniority rights under a bona fide collective bargaining agreement that did not lock in any past discrimination and which was completely nondiscriminatory against any religion; or (b) financing an employee's religious observances through payment of overtime wages to a replacement or depriving other work areas of coverage?

(2) Whether the court of appeals improperly precluded an employer with a large labor force from demonstrating an inability to reasonably accommodate without undue hardship the diverse religious practices of its employees?

(3) Whether the court of appeals failed to follow Rule 52(a) of the Federal Rules of Civil Procedure in holding the district court's findings clearly erroneous and in effect trying the matter *de novo*?



## STATEMENT OF THE CASE

### TWA's Business

Petitioner, Trans World Airlines, Inc. ("TWA"), has been engaged in the transportation of persons, property and mail by air since its organization in 1930. During that time, TWA has operated a transcontinental system in the United States providing an around-the-world air transportation service (A. 56-57). As a common carrier engaged in air service, TWA operates pursuant to authority granted by the Civil Aeronautics Board. That authorization requires the rendition of a safe, efficient and adequate public service in the public interest. To meet its obligations, TWA conducts operations on a twenty-four hour, seven-day-a-week basis (A. 23).

In 1969, TWA had approximately 42,500 employees (including approximately 2,500 working at the John F. Kennedy Space Center), of whom about eight percent were based outside the United States (A. 59).

Labor relations of air carriers, like TWA, are subject to Title II of the Railway Labor Act, as amended, 45 U.S.C. § 151 *et seq.*, which contains provisions giving employees the right to organize and bargain collectively through representatives of their own choosing and imposes on air carriers and their employees the duty to use every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle by negotiation all disputes arising between them (A. 59). Approximately fifty-three percent of TWA's employees were covered by collective bargaining agreements with labor unions in 1969, including approximately 15,000 employees covered under a contract with the International Association of Machinists and Aero Space Workers (here-

inafter referred to as "IAM" or in the collective sense as the "union", representing the local, district and international levels, each of which was a defendant in the district court) (A. 59).

TWA's principal maintenance and overhaul base ("overhaul base") is located at Kansas City International Airport, Kansas City, Missouri. The overhaul base includes Building No. 1, which is used for the overhaul of air frames and Building No. 2, which is used for the overhaul of aircraft engines. All of TWA's air frame overhaul work, as well as the overhaul and major maintenance of aircraft engines and aircraft components, is accomplished at the overhaul base (A. 59). It is the only overhaul base and the main repair station for TWA's entire system (A. 148-149).

TWA's seven-day-a-week operation depends upon support from a number of departments at the overhaul base, including the Stores Department. The work of the Stores Department includes the delivering of parts and materials to mechanics at the overhaul base for the purpose of repairing, maintaining and overhauling aircraft and engines both for TWA's own fleet and for other airlines (A. 23, 149-150). To insure that aircraft and equipment are available so that flights are not delayed or passengers cancelled off of a flight (A. 149), the activities in the overhaul base, and Stores Department, require a twenty-four-hour-a-day, seven-days-a-week, three shifts per day schedule every day of the year (A. 23, 24, 102, 116, 149-150). The Stores Department also has the obligation to supply airline needs in case of an emergency (A. 116). In the event of an employee's job not being filled, the work of the Stores Department is so important that another employee must stay on past his shift, come in early, or a supervisor must cover, even though other work areas may suffer (A. 125, 142-143).



**Hardison's Employment With TWA; Union Membership and a Bona Fide Nondiscriminatory Seniority System Under the Applicable Collective Bargaining Agreement**

Respondent, Larry G. Hardison ("Hardison") was hired by TWA on June 5, 1967, as a Stores Clerk in Building No. 1 at the Kansas City overhaul base (A. 23, 66, 101). He indicated on his application for employment that he was willing to work shifts, including weekends (A. 22, 23, 25).

Hardison's employment relationship with TWA was governed by a TWA-IAM collective bargaining agreement made pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (A. 24). At the time Hardison was employed by TWA and at all relevant times, the TWA-IAM agreement contained a seniority provision providing, in part, that:

> "The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement.
>
> * * *
>
> Except as hereafter provided in this paragraph, seniority shall apply in selection of shifts and days off within a classification within a department. . . ." (A. 214-217).

When Hardison was employed, he received a copy of the TWA-IAM Agreement, a copy of the International Union's Constitution and a copy of District 142's and Local 1650's By-Laws. He read all of the documents (A. 24, 78).

Under the seniority system, TWA cannot require a senior employee to work in place of a junior employee (A.

105, 137-143). There are no circumstances under which job trades disregard seniority as a matter of practice (A. 139).

The union steward fills all "bid-ins" or "bid-outs" of job vacancies (A. 127), maintains the seniority list and refers to it in determining what employees, according to seniority, fill jobs (A. 106, 127, 138, 158). Surveys of employees to fill jobs or trade shifts are made by the steward (A. 136, 138, 158). There was no volunteer or voluntary trade of shifts even on holidays (A. 138-140). On Christmas, for example, TWA would determine the number of people required to maintain service and advise the steward of the needed positions. The steward then makes contacts to see who wants to work, and if he is not able to satisfy the required number, the junior people are required to work (A. 138-140).

A uniform application of the seniority principles among all covered TWA employees is important in assuring a fair, organized and systematic working schedule (A. 151-154). The employees represented by the unions view seniority as a very serious and important contractual right (A. 163). Hardison even testified that some union members regard their seniority rights as preciously as he regarded his religion (A. 114). Also, quite a number of TWA's labor grievances involved seniority disputes (A. 163).

Regarding the difficulties of switching employees from shift to shift or job to job, Everett Kussman, TWA's Manager of the Stores Department, testified that TWA did not have complete versatility because of the seniority provision. Kussman stated, ". . . it isn't just like saying from here to here" (A. 140). Even without a seniority system, as the number of instances requiring preferential treatment increase, the difficulty of working out such arrangements would likewise increase (A. 140).



The parties stipulated that the TWA-IAM agreement was negotiated, ". . . without any intent to discriminate against any religion" (A. 41). The district court likewise found that, "The seniority system was not designed with the intention to discriminate against religion nor did it act to lock members of any religion into a pattern wherein their freedom to exercise their religion was limited" (A. 192). The district court also found that, ". . . it was coincidental that in plaintiff's case the seniority system acted to compound his problems exercising his religion" (A. 192).

## Hardison's Conversion to the Worldwide Church of God and TWA's Successful Efforts to Accommodate Hardison's Special Religious Holidays and Saturday Sabbath

Hardison began to study the religion known as the Worldwide Church of God in the spring of 1968 (A. 66, 72). That religion observes a Sabbath from Friday at sunset until Saturday at sunset (A. 67).

Hardison wrote Mr. Kussman on April 25, 1968, requesting, "either Friday and Saturday off or from Friday sunset to Saturday sunset off with the hours taken off Friday to be worked on Saturday evening or Sunday. My reason is *I sincerely believe this is the Sabbath and no servile work may be done then*" (A. 27, 28, 79, emphasis added).

On April 27, 1968, Kussman arranged a meeting with Hardison. At the meeting, Kussman and Hardison discussed the religious change in Hardison's life. Hardison said his new religion had special holidays and that he had obligations on his new Sabbath not to work (A. 117-123). Kussman had no objection concerning Hardison's new beliefs but he was concerned about staffing Hardison's job

because of the seniority requirements. Hardison thought he could arrange his Sabbath schedule within the framework of the seniority system (A. 122).

On May 3, 1968, Kussman wrote a memorandum to Burns Prater, TWA's Industrial Relations Representative in the Stores Department, in which Kussman outlined his April 27 meeting with Hardison. The memorandum provided as follows:

> "1. Agreed to steward seeking swap or days off.
>
> 2. Agreed to odd holidays (excused T. O.) if he works the Christian holidays when requested.
>
> 3. He advises you are getting him another job—agreed you should. Belongs to the World Wide Christian Church Garner Ted Armstrong, Ambassador College, Pasadena, California" (A. 28).

Mr. Prater responded to Kussman on May 7, 1968:

> "I haven't made any headway. His time off and day off requirement are too difficult to handle. I understand that no one would swap days off with him" (A. 28).

Kussman was able to agree to excuse time off for the religious holidays because the union had no objection (A. 42, 109, 120).

In September, 1968, Hardison requested and received a conference with Kussman (A. 80). The union steward, James Tinder, was also present (A. 28, 73, 80, 108). Hardison's time off requirements were again discussed. Kussman agreed to excuse time off on specific religious holidays if Hardison agreed to work on regular holidays. The steward was agreeable to the holidays being excused but in any swap or job change the seniority system would have to be followed (A. 81, 82, 108).



October 4, 1968, Hardison wrote Kussman informing him that the day off requirement was met by a transfer to the 11:00 p.m. to 7:00 a.m. shift. Hardison renewed his request for days off on his religious holidays which Kussman had promised to excuse and he thanked Kussman "for your sincere and understanding consideration and cooperation." In response, Kussman asked for a list of the religious holidays and again pointed out that for "reasons beyond my control" problems could arise "because of the union method of scheduling in turn" (A. 28-29). On October 20, 1968, Hardison supplied the dates of his religious holidays and told Kussman "I would like to thank you again for your sincere understanding and cooperation in this matter" (A. 29-31).

Following the April 25 memorandum and April 27, 1968 meeting through September, 1968, Hardison continued to work on his Sabbath including some voluntary overtime work which he was not required to do (A. 73-74, 79-80, 100-101). He made no request to have his Sabbath as a day off between April and October, 1968 (A. 123).

### Hardison's Voluntary Transfer for His Own Convenience to a Shift in Which He Did Not Have Sufficient Seniority to Insure His Ability to Observe His Sabbath

On December 2, 1968, Hardison voluntarily transferred from Building No. 1, where he had sufficient seniority to maintain a shift in which he could observe his Sabbath, to Building No. 2, where he was close to the bottom on the seniority list[2] (A. 67, 68, 103, 104). Hardison knew, prior to the transfer, that he would have such low seniority and that he could anticipate circumstances which would require

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2. The Stores Department in Building No. 1 and the Stores Department in Building No. 2 have two separate and different seniority groupings (A. 24, 103-104).

him to work on his Sabbath because of junior employees having vacation shifts or being otherwise unable to work (A. 104, 105). Hardison testified that he transferred because he was married and a change to Building No. 2 permitted him to work the day shift so that his evenings would be free[3] (A. 103-104).

Mr. Wyatt, the man immediately below Hardison in seniority in Building No. 2, scheduled a two-week vacation for March 3, 1969, through March 14, 1969 (A. 7). This meant that Hardison was scheduled to work on two Saturdays, March 8 and 15, 1969.[4]

### TWA's Efforts to Again Accommodate Hardison's Sabbath

As soon as Kussman observed the schedule requiring Hardison to work on Saturday, he initiated a meeting with Hardison and Tinder on March 6, 1969 (A. 69-72, 76, 126-127). Kussman sought to accommodate Hardison by agreeing to any trade of shifts or change of section agreeable to the Union and Hardison (A. 70, 77-78, 127). Tinder, however, would not waive the seniority rights of other union members so that any transfer or swap would have

3. Hardison was later divorced by his wife for grounds of nonsupport. He did not contest the divorce even though his Bible permitted divorce only on one different ground (Pet. A63).

4. Hardison's problem of not having his Sabbath as a day off was a permanent, not temporary, problem. The problem became acute during and after the above-noted two-week vacation schedule. Hardison missed work not only on the two Saturdays covered by Wyatt's vacation, March 8 and 15, 1969, but also on March 22, 1969. After March 22, 1969, Hardison was able to transfer to the twilight shift. He then left work on his new shift at sunset on Friday, March 29, 1969. It was never contended by Hardison, at trial, that his Sabbath problem was temporary. See Hardison's proposed findings of fact set forth in the Appendix filed with the court of appeals (Tr. App. 82-113). Also, the chairman of the Union Grievance Committee testified that Hardison had, ". . . a permanent problem, not a temporary one" (A. 178).



to meet the seniority provisions of the contract (A. 70, 71, 110-112, 145, 146). There were no other jobs open for bid and any shift or change was impossible within the seniority framework (A. 70, 92, 110-112, 213-217). Despite TWA's consent, the union was not willing to violate the seniority provisions to make a swap for Hardison (A. 107-224). Thus, accommodations acceptable to both Hardison and TWA were rejected by the union (A. 107).

The suggestion of Hardison working a six day week with his Sabbath off was discussed but the union could not agree because of the "40 hour work clause," namely, that any time over the standard 40 hour work week would be overtime pay and subject to seniority rights (A. 71). TWA could not allow Hardison a four-day work week because it needed regular employees and a four-day week would deprive TWA of work coverage on a day it needed a man to work (A. 127-128, 146, 153, 157, 244). For the same reasons, TWA could not fill Hardison's position with supervisory personnel, a person from a different work area or bring in a man not working (A. 125, 143, 150, 162, 240, 244). Also, time off for Hardison would have usurped seniority in another section or required overtime help at premium pay between one and one-half and double time (A. 126, 128, 216).[5] Moreover, the overtime on weekends would not be compulsory and TWA might not be able to get it (A. 128, 215-216). On a continuing basis, to require such overtime would indicate a company distortion of the seniority system (A. 134, 135, 142).

TWA believed it could do no more to accommodate Hardison (A. 135). TWA did, however, authorize the steward to ignore seniority and contact other employees.

5. The parties stipulated concerning the actual hourly rate of pay (A. 61).

It was the steward's normal task to do so (A. 106, 127, 138, 158).

At the conclusion of the March 6, 1969, meeting, Hardison was not satisfied with the fact that he would have to work on Saturday, March 8, 1969, but he did not file a grievance or take his problem to any union committee although he knew he could do so (A. 93).

Hardison was the only person scheduled to work in his essential job on his weekend shift (A. 75, 125, 156). As noted above, Hardison's department was obligated to supply airline needs in the event of emergencies. To leave his position empty could have imperiled the supplying of parts for airline operations (A. 116, 143), the work in his area could have been endangered (A. 125) and flights could be delayed or cancelled (A. 116, 143, 160, 161). If overtime help was not available to fill Hardison's job, the work was so important that a supervisor would have had to fill the job (A. 142) even though another work area would suffer (A. 125-128, 162). As Mr. Wilbur Stone, TWA's director of Industrial Relations at the overhaul base, testified, "It is a matter of being available to do the things that have to be done at that time (A. 162).

TWA's efforts at accommodation were complicated because of the minimal weekend work force required by contractual obligations with IAM (A. 120, 216). In fact, the collective bargaining agreement provided:

> ". . . At overhaul bases, every reasonable effort will be made in the future to arrange work schedules to allow Saturday and Sunday as regular scheduled days off. . . .
>
> * * *
>
> Except in an emergency, an employee will not be required to work overtime against his wishes." (A. 216).



Hardison also testified that employees with high seniority preferred not to work on weekends (A. 104). Thus, the number of employees available for weekend work was restricted because of seniority rights (A. 120, 134, 135, 154, 155).

In the opinion of Mr. Stone, if seniority variances based on religious preferences were granted, there would be a considerable number of employees requesting schedule changes. If all such employee requests were granted, it would be administratively impossible to maintain a fair, organized and efficient work schedule (A. 150-159). Moreover, had TWA forced another employee to trade shifts in violation of the seniority agreement, TWA would have been subjected to employee morale and grievance problems (A. 114, 135, 154-159, 238-245).

Hardison conceded that if he had been allowed to bump out of seniority, it would necessarily mean that an individual not sharing his religious beliefs would be deprived of seniority rights (A. 114).

### Hardison's Discharge and Failure to Cooperate With the Union to Appeal His Discharge

Hardison was absent from his scheduled work on March 8 and 15, 1969 (A. 31). On March 21, 1969, Hardison met with A. J. Butcher, Supervisor of Stores Planning and Control, and Tinder. As a result of that meeting, Butcher wrote Hardison advising that a discharge hearing would be scheduled if Hardison failed to appear for work on March 22, 1969 (A. 32, 33). Hardison was absent from work on March 22, 1969 (A. 31). On March 25, Hardison was advised that a discharge hearing was scheduled for March 28, 1969 (A. 34).

Prior to the discharge hearing, Hardison changed from the day shift to the twilight shift. This change enabled him

to have a day off on Saturday (A. 170-171). The union then believed that it could argue, at the discharge hearing, that the problem was solved; however, Hardison quit at sundown on Friday, March 28, 1969, and it became apparent to the union that Hardison's conflict had not been resolved and that the problem was permanent and continuing (A. 170-171).

A discharge hearing was held pursuant to the collective bargaining agreement. As a result of the hearing, Hardison's employment was terminated at the end of his shift on April 2, 1969 (A. 34-35). After his discharge, Hardison failed to file a grievance or cooperate with the union's efforts to appeal from the discharge hearing (A. 42, 175-176, 178-182, 231-232). Nor did Hardison, at any time, seek even a temporary solution through an *ad hoc* union relief committee (A. 143-145, 178, 180).

At no time did TWA intend to discriminate against Hardison or his religion (A. 159). Indeed, Kussman, a religious man himself, testified that he "respected the man's religious convictions" (A. 122 and 128) but that he did not believe ". . . in keeping with normal industrial practices in this nation, that I could require someone else to work in his place out of his work assignment on a continuing basis . . ." (A. 135). Similarly, no defendant made any statements impugning or expressing animus against Hardison's religious beliefs (A. 41).

### The Disparate View of the Facts and Applicable Duty to Reasonably Accommodate Without Undue Hardship Made by the District Court and the Court of Appeals

After a full evidentiary hearing, the district court observed that it was ". . . impressed with the men who were on the line handling the problem" (Pet. A.64 and R. 279, 280, 474). Judge Oliver found and concluded that, given



TWA's twenty-four-hour-a-day, seven-days-a-week business requirements (A. 244), TWA took appropriate action to accommodate Hardison by holding several meetings, including the meeting Kussman initiated, in an attempt to find a solution. TWA did accommodate Hardison's religious holiday observances and the steward was authorized to breach the seniority agreement (A. 238-240).[6] Hardison had an important job on the weekends and to replace him would leave other work areas without coverage (A. 244). To replace Hardison with another employee would also entail payment of premium wages (A. 244). With respect to any asserted duty to change shifts, Judge Oliver found that the seniority provisions prevented TWA from imposing, without union consent, upon other employees because of one employee's religious beliefs (A. 244) but that ". . . this case is a perfect example of a situation in which a *union* could accommodate [as] *TWA agreed* that plaintiff could change shifts if the union approved" (A. 224, emphasis added). Judge Oliver also referred to the seniority provisions of Title VII, 42 U.S.C. § 2000e-2(h) which permits different treatment to different employees based upon a bona fide seniority system (A. 244-245) and found that the seniority system was not designed with the intention to discriminate against religion nor did it act to lock members of any religion into a pattern wherein their freedom to exercise their religion was limited (A. 227). It was

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6. The district court, in its opinion, referred to Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 Mich. L. Rev. 599, 628 (1971) and stated that the authors described the burden of proving the absence of undue hardship as nearly impossible to demonstrate if the work force is large enough: "They rightly argue that such an interpretation imposes a priority of the religious over the secular in that it might require an employer to favor employees whose religious beliefs require them to follow different schedules than the regular over other employees, even to the point of violating the other employees' bargained for rights" (citation omitted) (A. 224-227). The district court concluded that any other decision would raise constitutional questions (A. 226).

only "coincidental" that the seniority system acted to compound Hardison's problems in exercising his religion (A. 227). Judge Oliver, therefore, held that the unions were subject to the accommodation requirement and that they too had met their duty "under the circumstances of this case" (A. 228 and 231).

Notwithstanding the district court's firsthand observation of the witnesses and the opportunity to determine their credibility, the court of appeals, after having the matter under advisement for 53 weeks, found Judge Oliver's findings of fact clearly erroneous and proceeded to impose a far stricter duty upon TWA than did the district court. For the court, Judge Webster cited Matthew 27:24 and cast TWA in the role of "Pontius Pilate" (A. 254). The court of appeals disagreed with the findings of fact by the district court (A. 256) and, essentially because of TWA's size, concluded that TWA could have permitted Hardison to work a four-day week despite being left shorthanded on other shifts or TWA could have required a supervisor or other worker to fill Hardison's job even though that too could cause work functions in other areas to suffer (A. 256-258); that TWA could have violated the seniority provisions of the collective bargaining agreement despite no union consent being given (A. 259-261); and that TWA could have incurred the additional expense of securing an overtime replacement (A. 258).[7] Thus, it did not matter

7. The court of appeals asserted that neither Hardison nor his religion would have benefited from such an accommodation; however, the district court sustained an objection to a question as to whether Hardison had agreed to share any recovery in this lawsuit with his religion (A. 258, n. 9 and Pet. A63-64). It is apparent that no other employee would have had a four-day work week and no other religion would be able to require an employer to incur such extra costs so that church members could supposedly attend church and make regular contributions. Other erroneous and inconsistent factual assertions by the court of appeals will be discussed *infra* in respect to the argument that the court of appeals violated Rule 52(a) Fed.R.Civ.P. by trying the case *de novo*.



to the court of appeals that TWA had no intent to discriminate; that there was no history or lingering vestiges of a past pattern of discriminatory practices against any religion; that TWA had initiated and held meetings with Hardison and the union to find an accommodation; that TWA, with union consent, granted Hardison's needs to have special days off for his religious holidays; that other employees, who viewed seniority as an important right and who did not share Hardison's religious belief, would be deprived of uniformly applied seniority rights; that TWA consented to any shift, swap or job change to which the union would agree; that, without union consent, TWA could face employee morale and grievance problems in ignoring seniority, particularly when a large number of TWA's grievances already related to seniority problems; that if TWA had to grant similar preferential treatment to its many employees' diverse religious practices, that it would become impossible to schedule work; that Hardison was the only person fulfilling his important job on his shift with an already reduced weekend work force; or that Hardison voluntarily and knowingly jeopardized his ability to observe his Sabbath by transferring to a new shift where he was next to the last on the seniority list. The court of appeals, in essence, read the words "*reasonable* accommodation" (emphasis added) out of the statute thereby equating discrimination with a good faith failure or inability to "find" an accommodation (A. 259, n. 10). The "undue hardship" test was construed to mean "*manifestly* undue hardship" (A. 257, n. 8).

## SUMMARY OF ARGUMENT

The religious accommodation requirement of Title VII violates the Establishment Clause of the First Amendment. The neutrality required by the Constitution is not observed

because the challenged statutes and guidelines compel a private employer to grant preferential treatment to an employee solely because of his religious beliefs notwithstanding the employer's own beliefs or business needs, the presence of uniformly administered work rules emanating from a bona fide nondiscriminatory collective bargaining agreement containing seniority provisions, the rights of other employees who may or may not have any religious beliefs, and the lack of any intentional discrimination. Because of the 1972 amendment's purpose to aid religion, primary effect of advancing religion and pervasive entanglement of government in religious issues, the accommodation requirement falls within the prohibition of the Establishment Clause. The broad definition of religion to include all religious practices compounds the constitutional defect.

The court of appeals erred in imposing an unrealistic standard upon the employer and in violating Rule 52(a) Fed.R.Civ.P. by trying the issues of reasonable accommodation and undue hardship *de novo*. Discrimination was equated with a good faith inability to accommodate: The court failed to consider the adverse impact the requirement has upon important and pre-existing national policies embodied in the Railway Labor Act and the National Labor Relations Act. The realities of work scheduling problems, the need for uniform work rules and problems resulting from employee grievances were also ignored despite the language of Section 703(h) that protected, ". . . bona fide seniority system[s] . . . provided that such . . . are not the result of an intention to discriminate. . . ." An employer with a large labor force was precluded from satisfying the standard by anything short of actual accommodation. The district court, on the other hand, applied a proper standard in finding that TWA had taken affirmative action to accommodate and that further steps would have constituted an undue hardship upon TWA's continuous operation requirements. Additionally, in the circumstances of this case, no duty existed to violate, without union consent, a bona fide and nondiscriminatory seniority system.



The district court had the opportunity to observe the witnesses and to judge their credibility. The evidentiary record amply supports the district court's findings. The court of appeals' substitution of its own view of the facts violates Rule 52(a), thereby requiring the exercise of this Court's supervisory powers. The fundamentally different role of the trial and appellate courts must be respected if a workable standard for the determination of "reasonable accommodation-undue hardship" is to be attained.

## ARGUMENT

### I. The Statutory and EEOC Guideline Requiring an Employer to Accommodate an Employee's Religious Practices Violate the Establishment Clause of the First Amendment.

At the time of Hardison's discharge, Section 703(a)(1) of the Civil Rights Act of 1964 provided, in pertinent part, as follows:

> "It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1).

There was no provision for any duty on the part of the employer to accommodate the diverse religious beliefs of employees. However, in 1967, the EEOC announced a

guideline expressing its belief that Section 703(a)(1) included an obligation on the part of the employer to ". . . make reasonable accommodations to the religious needs of employees . . . where such accommodations can be made without undue hardship on the conduct of the employer's business . . ." 29 C.F.R. § 1605.1(b). The EEOC also placed upon the employer the burden of, ". . . proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable." 29 C.F.R. § 1605.1(c).[8]

In 1972, Congress amended the original statute by defining "religion" in Section 701(j) of the Act as follows:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j).

While both the district court and court of appeals held that the 1972 amendment reflected the intent of Congress

8. The 1967 guidelines replaced an earlier version, promulgated in 1966, which had imposed a less onerous burden on the employer to accommodate the religious practices of his employees. 31 Fed. Reg. 8370. The 1966 guidelines had required no accommodation whatever if such efforts would have resulted in either a serious inconvenience to the employer or a disproportionate allocation of unfavorable work. Further, the guidelines authorized the employer to prescribe a work week applicable to all his employees, even if his schedule did not operate uniformly in its impact upon their religious practices. Specifically, the guidelines provided:

> "The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alteration in such requirements to accommodate his religious needs."



vis-a-vis the EEOC's 1967 revised guidelines (A. 233-236 and 253-254), the question of retroactivity has not been resolved.[9]

The 1972 amendment and the 1967 revised guidelines represent efforts by the Federal Government to impose upon private employers the duty to give preferential treatment to employees solely because of the employees' religious beliefs. Far from enhancing less discrimination in employment, the statute and guideline, as construed by the court of appeals, not only create more discrimination by inexorably dispossessing employees of bona fide seniority rights and other uniform work rules bargained for on behalf of all employees, but they also raise inevitable questions concerning which employee's religion is to be preferred. The requirement cannot withstand constitutional muster under the Establishment Clause of the First Amendment. In granting such preferential treatment, the employer also runs afoul of the thrust of *McDonald* v. *Santa Fe Transportation Company*, ..... U.S. ....., 49 L.Ed.2d 493 (1976) that all discrimination in employment is a matter of national concern. The requirement thus extends far beyond the intent and scope of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) and the therapeutic inten-

9. See generally *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 331, n. 1, 334 (6th Cir. 1970), *aff'd* by an equally divided Court, 402 U.S. 689 (1971); *Riley* v. *Bendix Corp.*, 330 F. Supp. 583 (M.D. Fla. 1971), *rev'd* 464 F.2d 1113 (5th Cir. 1972); and *Kettel* v. *Johnson & Johnson*, 337 F. Supp. 892 (E.D. Ark. 1972). The court of appeals noted that "a different panel of the Sixth Circuit (Edwards J., dissenting) seems to have receded from its prior holding that the regulation was consistent with the statute. *Reid* v. *Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975). We are more persuaded by the earlier opinion and Judge Edwards' dissent" (A. 254, n. 1). On November 15, 1976, certiorari was denied in *Reid*, No. 75-1105. It is TWA's position that the amendment can only be given a prospective application. Thus, no duty to accommodate ever existed in this case. *Peony Park* v. *O'Malley*, 223 F.2d 668 (8th Cir. 1955), *cert. denied* 350 U.S. 845, *rehearing denied* 350 U.S. 898.

tions of *Franks* v. *Bowman Transportation Corp.*, ..... U.S. ....., 47 L.Ed.2d 444 (1976).[10]

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10. *Griggs* sought to outlaw invidious *racial* discrimination by prohibiting discriminatory preferences for any group resulting from "artificial, arbitrary and unnecessary barriers" so that "race, *religion*, nationality and sex become *irrelevant*." *Id.* at 431 and 436 (emphasis added). *Franks* did not concern a bona fide seniority system that, as in this case, was admittedly and by court finding nondiscriminatory toward any religion and one that did not lock in the effects of past discrimination.

Neither *Griggs* nor *Franks* presented Establishment Clause issues. A Federal Government attempt to require private employers to accommodate the varying and diverse religious practices of employees must be governed by different standards. For one thing, religious beliefs are undeniably subjective and race is not. Also, religious beliefs may be acquired and abandoned at will, whereas race cannot be so altered. Indeed, numerous legal commentaries have concluded that the accommodation requirement violates the Establishment Clause. See generally: Edwards and Kaplan, *Religious Discrimination and the Rule of Arbitration Under Title VII*, 69 Mich. L. Rev. 599, 628 (1971) wherein the authors expressed concern that the duty to accommodate placed an intolerable burden on the employer, that the burden of proving the absence of undue hardship was nearly impossible to demonstrate if the work force is large enough, that the requirement imposes a priority of the religious over the secular and that it is premised on a fundamentally distorted conception of the proper place of religion in a secular society. See also, Recent Development, *Can the Government Require Accommodation of Religion at the Private Job Site*, 62 Va. L. Rev. 237, 257-258 (1976) in which it is concluded that the accommodation requirement finds, ". . . little justification in establishment clause jurisprudence . . . [nor] is the accommodation supported by an overriding secular government interest. Not even historical practice supports the rule. Consequently, it breaches the governmental neutrality on questions of religion required by the first amendment"; Note, *Is Title VII's Reasonable Accommodation Requirement A Law Respecting an Establishment of Religion*, 51 Notre Dame L. Rev. 481, 491 (1976); *Constitutional Law—Establishment Clause—Sixth Circuit Questions Validity of the Reasonable Accommodation Rule*, 44 Fordham L. Rev. 442 (1975); and Comment, *Up Against the Accommodation Rule*, 45 U.M.K.C. L. Rev. 56, 70-74 (1976). Compare with, Note, *Title VII—Religious Discrimination—Employer's Duty to Reasonably Accommodate Employee's Religious Practices*, 9 Creighton L. Rev. 795, 805. *But see* Note, *Civil Rights—Religious Discrimination In Employment—Title VII Standards of "Reasonable Accommodation" and "Undue Hardship" Are Constitutional, But Recent Cases Illustrate Judicial Overzealousness In Enforcement*, 54 Tex. L. Rev. 616 (1976) and Comment, *Religious Observance and Discrimination in Employment*, 22 Syracuse L. Rev. 1019 (1971).



The Establishment and Free Exercise Clauses are framed in absolute terms and this Court has been compelled to find a neutral course between the two, *Walz* v. *Tax Commissioner*, 397 U.S. 664, 668-69 (1970). The history of the nation and the legal development of the first amendment indicates that we are a "religious people" and that some relationship between government and religious organizations is inevitable. *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952) and *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 760 (1973). As a result of the "tension" between the two clauses and the practical reality of "some relationship", a general constitutional requirement has emerged that the state must maintain an attitude of "neutrality". *Id.* at 788. While *Nyquist's* "three-part" test synthesized the constitutional standards and guidelines applicable to the Establishment Clause, a reference to cases preceding *Nyquist* underscores the searching scrutiny to which this Court has subjected governmental actions that are challenged as impermissibly benefiting religion. The channel is a "narrow one". *Id.* at 776.

The early leading case dealing with the Establishment Clause is *Everson* v. *Board of Education*, 330 U.S. 1 (1947). There Mr. Justice Black vividly portrayed the historical strife and persecutions resulting from the relationship of government with various competitive religious beliefs. The desire to be free from such debilitating disputes gave birth to the Establishment Clause.[11] *Everson* held that under the Establishment Clause, neither a state nor the federal government could, "pass laws which aid one religion, aid all religions or prefer one religion over another,"

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11. The history and development of the Establishment Clause is thoroughly reviewed in many decisions of this Court. See generally *Everson*, at 33 (Rutledge, J. dissenting) and *Abington School District* v. *Schempp*, 374 U.S. 203, 234 (1963) (opinion of Brennan, J.).

*Id.* at 15. The "wall of separation" language. *Id.* at 16, articulated a separationist or no-aid-to religion view. The government must be "neutral in its relations with groups of religious believers and non-believers". *Id.* p. 18.[12]

The accommodation requirement violates the constitutional command and extends far beyond the general neutral benefit narrowly countenanced in *Everson's* factual context. Here, as contrasted to *Everson's* facts, the government is requiring a private person to accede to and accommodate another person's religious beliefs. Thus, regardless of whether the accommodated beliefs are compatible with personal or business needs, an accommodation is required unless an *undue* hardship can be proved by the accommodating person. Nor does it matter that the rights of third parties may be adversely affected. Additionally, the requirement is not, in any sense, neutral as between religious "believers and nonbelievers."

Subsequent to *Everson*, this Court's parameters of tolerable government activities has, in practice, been carefully circumscribed. Illustratively, those laws requiring the religious exercises of school prayers were held to violate the Establishment Clause in *Engel* v. *Vitale*, 370 U.S. 421 (1961) and *Abington School District* v. *Schempp*, 374 U.S. 203 (1963). The laws were found to have the purpose and primary effect of advancing religion. The release

12. In *Abington School District* v. *Schempp*, 374 U.S. 203, 222 (1963), Mr. Justice Clark noted that this Court has rejected unequivocally the contention that the Establishment Clause forbids only government preference of one religion over another. The wholesome neutrality sought by the Court, ". . . stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions . . . to the end that the official support of the State or Federal Government would be placed behind the tenets of one or all of the orthodoxies." See also, *Id.* at 259 (opinion of Brennan, J.). *Torasco* v. *Watkins*, 367 U.S. 488 (1961); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968) and *Walz*, *supra*, at 695 (opinion of Harlan, J.) *Id.* at 713 (Douglas, J. dissenting).



time prayer program in *McCollum* v. *Board of Education*, 333 U.S. 203 (1947) was likewise found to violate the Establishment Clause. Even after removal of many coercive aspects, the concept narrowly survived constitutional review in *Zorach*, *supra*. Similarly, the state purchase of *secular* school books for the benefit of all children barely escaped constitutional invalidity in *Board of Education* v. *Allen*, 392 U.S. 236 (1968).[13] Yet, in *Torasco* v. *Watkins*, 367 U.S. 488 (1961), the interests of a state in the integrity of officials, while important, did not warrant the screening of applicants by a religious test.

In very limited cases, this Court has permitted laws to withstand constitutional attack if, for example, an overwhelming state interest was involved, *Gillette* v. *United States*, 401 U.S. 437 (1971) (a strong governmental interest inherent in selective service exemptions) or where an original religious purpose had historically evolved into a widely accepted secular purpose such as providing a uniform day of rest, *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Braunfield* v. *Braun*, 366 U.S. 599 (1961); *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1961). Also, narrowly defined and historically accepted tax exemptions to all charities, including religious, were approved in *Walz*, *supra*. The Court has also permitted a general and indirect aid of a nonsectarian character

13. Mr. Justice Black's dissent detailed the dangers he viewed as steming from *Allen*. In *Nyquist*, *supra*, at 796, the Court observed that Mr. Justice Black's fears were being obviated by post-*Allen* decisions. One can easily envisage that similar fears could result from approval of the accommodation requirement. It is a short step for a government to hereafter require "reasonable accommodation-undue hardship" as a condition precedent to receiving occupational licenses or the use of employers to make and collect contributions for their religious employees. Similarly, it may well not be considered an unreasonable accommodation for the State to hereafter permit direct or indirect tax subsidies or grants for religious purposes if no "undue hardship" exists.

but only if comprehensive, discriminatory and continuing state surveillance could be avoided. *Tilton* v. *Richardson*, 403 U.S. 672 (1971) and *Lemon* v. *Kurtzman*, 403 U.S 602 (1971). But, care was taken to insure that use of grants for religious purposes was avoided.

Application of the principles established by the foregoing authorities indicates that this case presents a more compelling example of a breach of the Establishment Clause than any factual context heretofore presented to this Court. The granting of special employment preferences to Hardison solely because of his professed religious beliefs is a direct use of the "machinery of the State" to further his religion (*Abington, supra* at 226) and is counterproductive to cardinal provisions of the Railway Labor Act and National Labor Relations Act.

Unlike the situation in *Zorach, supra* at 313, religious practices of various religious groups are not flourishing, ". . . according to the zeal of its adherents and the appeal of its dogma" but rather because the government is coercing a private employer to accommodate the varying religious beliefs and practices of his employees. Thus, a vice of the accommodation requirement is that the State is lending its assistance to a church's efforts to gain and keep adherents. *Abington, Id.* at 228 (opinion of Douglas, J.).[14]

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14. The statute and guideline are facially based upon the impermissible supposition that the coercive power of the federal government is required to insure the viability and vitality of certain religious sects. *Zorach* rejects such a concept. See also, *Id.* at 324-325 (Jackson, J. dissenting):

> "It is possible to hold a faith with enough confidence to believe that what should be tendered to God does not need to be decided and collected by Caesar."

Even if the requirement would apply across the board for all religions, the result is the same—religion as a whole cannot be sustained by the federal government's coercive powers over private employers.



The court of appeals conceded that the view that it is constitutionally impermissible for a government to enforce accommodation of religious beliefs in a manner which results in privileges being available to a believer which are not available to the nonbeliever, is not "without articulate support" (A. 264). Nevertheless, the court of appeals relied upon the district court's opinion which, without an extensive analysis, found the requirement constitutional (A. 236-238). That reliance is misplaced because Judge Oliver's decision below was carefully limited to his view, unlike the court of appeals, that Title VII could not, "be interpreted to require that companies finance employees' religious beliefs" (A. 244) and that shifting employees "out of seniority" and a "hypertechnical application of the words 'undue hardship of the employer's business' " would impose a priority of the religious over the secular and would raise "constitutional questions" (A. 226).[15]

The court of appeals likewise misplaced its reliance upon the constitutional reasoning of the Court of Appeals for the Sixth Circuit in *Cummins* v. *Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), *aff'd* by an equally divided court, ..... U.S. ....., 50 L.Ed.2d 233 (1976). It ignored Judge Celebrezze's dissent and agreed, without analysis, with *Cummins'* two-judge majority that *Griggs, supra* and *Gillette* v. *United States*, 401 U.S. 437 (1971) were dispositive of the constitutional challenge (A. 265). The court of appeals did not believe the accommodation requirement advanced religion because "no financial support was mandated" and that, in its view, less government entanglement was involved than in *McGowan, supra* (A. 266). To the contrary Judge Celebrezze's dissent demonstrates the clear danger that if government is allowed to grant such

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15. The district court referred to Edwards and Kaplan, *supra*. See footnotes 6 and 10, *supra*.

benefits, it is thereby empowered to take away basic religion liberties, *Cummins, supra* at 554-560.

*Griggs, supra,* deals with racial discrimination. It has no conceivable application to the far different Establishment Clause issues presented in this case. *Gillette, supra,* likewise fails to salvage the accommodation requirement. As the court of appeals noted, *Gillette* upheld certain draft exemptions for conscientious objectors upon "pragmatic grounds" (A. 265). The pragmatic realities of the accommodation requirement, on the other hand, require the opposite result in this case. Illustratively, accommodation of employee religious beliefs frequently cannot be made without disruption of work schedules and creation of inequitable preferential personnel practices. The whole country has a high stake in maintaining favorable labor relations between employers and unions, particularly in complex industrial systems. To deprive more senior employees of seniority rights and other uniform work rules to accommodate the diverse religious beliefs of other employees will result in employee grievances, morale problems, work scheduling problems and overtime replacement expenses. Thus, the compelling state interest in the accommodation requirement is far more tenuous and complicated, as well as frustrating to other important and already existing governmental policies, than the singular and unique interest applicable in *Gillette*.[16] Further, the requirement

16. A clear example of the reach of accommodation requirement as construed by the court of appeals below is *Yott* v. *North American Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974). In *Yott*, the Ninth Circuit was confronted with a challenge to a "union shop" provision which *Yott* claimed violated his religious beliefs not to join a union or support one by dues. Objections to union shop agreements on religious principles is not a recent innovation of Title VII, but rather presents a question which has previously been raised and rejected under the Free Exercise Clause. *E.g., Otten* v. *Baltimore & O.R.R.*, 205 F.2d 58 (2d Cir. 1953); *Wicks* v. *Southern Pacific Co.*, 231 F.2d 130 (9th Cir.), *cert. denied* 351

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of meeting uniformly applied work rules is not the type of "punishment" that was involved in the criminal prosecution in *Gillette*. Finally, there is no evidence that the accommodation requirement is "secular in purpose," "even-handed in operation" and "neutral in primary impact." *Gillette, supra* at 450.[17]

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U.S. 946 (1956); *Gray* v. *Gulf, M. & O.R.R.*, 429 F.2d 1064 (5th Cir. 1970), *cert. denied* 400 U.S. 1001 (1971); *Linscott* v. *Millers Falls Co.*, 440 F.2d 14 (1st Cir.), *cert. denied* 404 U.S. 872 (1971); *Hammond* v. *Papermakers Union*, 462 F.2d 174 (6th Cir.), *cert. denied* 409 U.S. 1028 (1972). Upon shop agreements, which were in reality an accommodation of religious beliefs because of their limited enforcement rights, *e.g., NLRB* v. *Hershey Foods Corp.*, 513 F.2d 1083 (9th Cir. 1975), were found to be constitutional because the compelling governmental interest in requiring that all employees pay their fair share for union representation outweighed the individual right to the unrestricted exercise of his religion. See, *Linscott* v. *Millers Falls Co.*, 440 F.2d at 17-18. *Yott* thus clearly shows that the accommodation requirement of Section 701(j) may be construed to extend Title VII's protections past those guaranteed by the Free Exercise Clause and to require the employer and other employees to pay for an employee's exercise of his religion. The differing views of the duty to accommodate such union rules are also illustrated by the three opinions rendered in *Cooper* v. *General Dynamics, Convair Aerospace Div.*, 533 F.2d 163 (5th Cir. 1976), *rev'g* in part 378 F. Supp. 1258 (D.C. Tex. 1974).

Furthermore, the large variety of religions and possible accommodation requirements present much greater administrative problems than those present in *Gillette*. For example, as of April, 1975, approximately 77,994,000 persons were employed in non-agricultural establishments, including manufacturing, wholesale and retail trade, government, transportation and public utilities, finance, insurance and real estate, contract construction and mining. U.S. Bureau of the Census, *Statistical Abstract of the United States*: 1975, Table No. 579 at p. 353 (96th ed. 1975).

Membership in religious bodies for the year 1973 totaled 131,245,000. Some denominations celebating a Sabbath which commences on Friday sundown and ends on Saturday, include the following: Seventh-Day Adventists—464,000; Jewish—6,115,000.

The burden imposed upon an employer is by no means limited to reasonably accommodating Sabbatarians. Many Americans are affiliated with non-Judeo-Christian religions which celebrate entirely different holidays. The only such religion with a membership in excess of 50,000 is the Buddhist persuasion—60,000. *Id.*, Table No. 63 at p. 46.

17. See Fordham L. Rev. 442, 449 and 62 Va. L. Rev. 237, 248, 255.

*McGowan, supra,* was again a practical decision [illegible] approved "Sunday closing" laws having a long history as an accepted tradition which no longer had a non-secular purpose. Rather, the evolved purpose—a uniform day of rest for all workers—was clearly secular. On the other hand, application of the accommodation requirement is directly contrary to *McGowan's* historical tradition and, significantly, unlike *McGowan,* will result in a nonuniform treatment of employees. Indeed, historically, our country has favored uniform work rules without special preferences for any group. Further, the accommodation requirement is not limited to days off for religious purposes but it extends to *all* religious beliefs and practices. Additionally, the Sunday closing cases recognized that a Saturday Sabbatarian, like Hardison, could be required to choose between his religious faith and his economic survival vis-a-vis the uniform day of rest policy underlying the Sunday closing laws. *Braunfield* v. *Braun,* 366 U.S. 599, 616 (1961) (Stewart, J. dissenting). Hardison's personal accommodation would not entail anywhere near the sacrifice sanctioned in *Braunfield* because he could have remained in a shift with no seniority fear of having Saturday work days or he could have found a job more suitable to the requirements of his newly discovered faith. Moreover, no matter how great the sympathy one has for the burdens of conscience, it does not justify, ". . . an eroding of the limitations of the Establishment Clause . . ." *Nyquist, supra* at 790.

The court of appeals' narrow view that the religious accommodation requirement met constitutional muster because "no financial support was mandated for religious institutions" (A. 266) is unsupportable. For one thing, the only conceivable benefit to Hardison was to advance his ability to practice his religion. No other purpose other



than to aid his religion could be construed from the practical effect of accommodation. Moreover, the Establishment Clause is not confined to prohibition of a congressional enactment establishing churches. *Abington, supra* at 220 and *McGowan, supra* at 441. The Clause reaches beyond subsidies or tax benefits and proscribes government nonfinancial "sponsorship" of religious organizations. *Nyquist, supra* at 772. *Walz, supra* at 668 and *Lemon* v. *Kurtzman, supra* at 612. The Establishment Clause thus forbids "subtle departures" from neutrality as well as "obvious abuses," *Walz* at 696 (opinion of Harlan, J.) and *Gillette, supra* at 452.

While not relied upon by the court of appeals, the neutrality theory has, at times, been accommodated after a balancing is made in cases involving the Free Exercise Clause. Two leading cases illustrating such an accommodation are *Sherbert* v. *Verner,* 374 U.S. 398 (1963) and *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972). Neither of those Free Exercise Clause cases are, however, conclusive on the Establishment issues presented. The district court, for example, properly found that it was "coincidental" (A. 227) that the applicable seniority system, and hence employment relationship, acted to compound Hardison's problem in exercising his religion. Thus, no direct violation of the Free Exercise Clause exists. Similarly, just as in *Nyquist, supra* at 788, where the Court rejected the argument that failure to provide aid to parochial schools would be a Free Exercise violation, Hardison has no claim that his Free Exercise rights are violated by meeting uniformly applied work rules. See also *Gillette, supra* at 462, where the Court rejected a Free Exercise claim by arguing that plaintiff's burden was "incidental." Moreover, the relationship of government and the individual under the Free Exercise Clause is wholly different from a private employ-

ment relationship, especially where, as here, a bona fide collective bargaining agreement operates alongside Title VII.[18]

*Yoder, supra,* is also distinguishable in that it accommodated the long-standing religious and ethnic values of a truly unique group of people, the Amish.[19] There, the government was trying to impose an unwanted and unneeded educational requirement upon the Amish despite

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18. *Sherbert* is distinguishable upon the additional ground that the state statutory scheme there at issue was not even-handedly applied in that it actually and affirmatively discriminated against Saturday, as contrasted to Sunday, worshippers. Here, the seniority provision was uniformly applied. Also, the plaintiff would have been "destitute" in *Sherbert;* whereas, Hardison plainly could seek out employment not requiring Saturday work. In fact, Hardison had such a job at TWA before he voluntarily transferred to a shift in which he knew he would not have sufficient seniority to insure his ability to observe his Sabbath. Finally, in *Sherbert,* unlike here, no other person's rights would be directly and adversely affected by the denial of benefits.

19. While the World Wide Church of God may constitute a religion within the broad meaning of Section 703(a)(1) and 701(j), the record does not reveal that, like the Amish, it has a long, established history demonstrating, ". . . the interrelationship of belief with their mode of life, the vital role of that belief . . . in the continued survival of Old Order Amish." *Yoder,* at 209-212. Further, the typical Amish followers have been born and reared in that unique way of life. The danger of creating an invidious or ill-conceived "exception" to a general obligation was not present. On the other hand, in this case Hardison was a recent "convert." While TWA respected his beliefs and did not discriminate against him, the fact that religious beliefs can be rooted in emotionalism and evolving personal beliefs subjects employers to the added problem of accommodating to the *changing* religious beliefs of employees. Indeed, when hired, Hardison indicated he would work weekend shifts (A. 25). Hardison's own background revealed that he had a proclivity to join unusual organizations as demonstrated by his participation in the Minutemen organization (Pet. A. 63, R. 195-197); however, TWA took no disciplinary steps against Hardison because of any of his beliefs or group memberships. It was only when those beliefs infringed upon the rights of other employees thereby leading to extra costs, work scheduling problems and the administrative problems of employee morale and grievances was TWA able to go no further. It is worthy of note that after Hardison's "conversion," he voluntarily performed premium paying overtime work (A. 74).



a history of "three centuries" as a "successful and self-sufficient segment of American society." *Id.* pp. 209-212. While deferring to the unique facts presented, the Court noted that the "danger of an exception" from a general obligation of citizenship may run afoul of the Establishment Clause. *Id.* at 220-221. Here, in sharp contrast, Hardison is not part of a "self-sufficient segment" but rather he voluntarily thrust himself and his religion into the hustle and bustle of secular life. He bumped into a job position he coveted for secular reasons. He likewise should respect the seniority rights of others and share the disadvantages of being a part of a communal-secular environment rather than being granted a preferential exception from an otherwise neutral and general obligation. In such circumstances, the teaching of Learned Hand in *Otten* v. *Baltimore & O.R.R.,* 205 F.2d 58, 61 (2nd Cir. 1953) should be controlling:

> "The First Amendment protects one against action by the government . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform to his own religious necessity. . . . *We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfactions from within, or our expectations of a better world.*" (Emphasis added).

While the freedom of *belief* under the Free Exercise Clause is wide-ranging, see *Prince* v. *Massachusetts,* 321 U.S. 158 (1944), in the context of collective bargaining agreements under the Railway Labor Act or the National Labor Relations Act, the Court has properly emphasized the need to subjugate the interests of the individual to those of the union group. *Vaca* v. *Sipes,* 306 U.S. 1 (1967).

The need for uniformity in the application of work rules and labor relations has also been emphasized by the Court. *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957).

A balancing of the Free Exercise desires of individual employees against the obvious need for uniformly applied work rules in the many industries, like TWA, that operate on a continuous basis twenty-four hours per day, seven-days-a-week and 365 days each year and which have thousands of employees with diverse religious practices, must indicate that an employer cannot be required to accommodate individual religious preferences. Indeed, in the collective bargaining context, an even-handed administration of uniform rules actually would serve the compelling interest test of *Sherbert* and guard against the ill-conceived "exception" feared in *Yoder*.[20] Otherwise a special preference for Hardison, and all other employees who claim the same or different reasons for avoiding their work schedules, would be unfair to all other employees by establishing a pattern of discrimination that favors and exempts certain religious believers. That is particularly apt where, as here, the seniority provisions cut across all religious grounds and because there is no evidence of discrimination against Hardison's religion.

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20. See, for example, *Andrews* v. *O'Grady*, 252 N.Y.S.2d 814, 819 (N.Y. 1964):

> "There can be no doubt, from long experience, that the seniority rules to which petitioner has refused to conform are the only fair way to assure that every man is treated on a nondiscriminatory basis with respect to work assignments."

And see *In Re Eastern Greyhound Lines Division of Greyhound Lines, Incorporated* v. *New York State Division of Human Rights*, 27 N.Y.2d 279, 265 N.E.2d 745, 317 N.Y.S.2d 322, *aff'g* 34 App. Div. 2d 916, 311 N.Y.S.2d 465 (1970) where a bearded Muslim was not hired because the employer had a rule against all employees wearing a beard. The refusal to hire was upheld where it was not shown that, ". . . the employment decision was in fact actuated by discrimination against creed." See further, Edwards & Kaplan, *supra* at pp. 630-641.



The accommodation requirement of Section 703(a)(1) and 701(j) cannot withstand review on any part of the three-pronged test set forth in *Nyquist, supra* at 773:

> ". . . the law in question first must reflect a clearly secular legislative purpose . . ., second, must have a primary effect that neither advances nor inhibits religion, . . ., and, third, must avoid excessive governmental entanglement with religion. . ." (Citations omitted).

See also *Meek* v. *Pittenger*, 421 U.S. 349, 358 (1975). A law challenged on Establishment Clause grounds must satisfy each part of the test. See *Nyquist, supra* at 774; *Epperson, supra* at 107; *Abington, supra* at 222; and *Lemon* v. *Kurtzman, supra* at 613-15.

### A. The Statute and Guideline Lack a Primary Secular Legislative Purpose.

The legislative history of the Civil Rights Act contains no suggestion that religious discrimination in employment was a problem requiring remedial legislation.[21] More importantly, Senator Randolph, the amendment's sponsor, explained that its purpose was admittedly to stem the "dwindling of the membership of some religious organizations" which prohibit Saturday labor and because of a "possible inability of employers on some occasions to adjust their work schedules to fit the requirements of the

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21. According to Congressman Cellar, then Chairman of the House Judiciary Committee:

> "We did not have very much testimony of discrimination on the grounds of religion. You will notice in one of the titles, religion is left out. . . . We had very little evidence—I do not think we had any of it insofar as the Committee on the Judiciary is concerned that any particular sect or religion had been discriminated against." 110 Cong. Rec. 1528-29 (1964).

faith of some of their workers" 118 Cong. Rec. 705 (1972).[22] Thus, the accommodation requirement was explicitly designed to benefit specific religious groups without regard to an employer's "inability" to adjust work schedules or to the rights of other employees who do not share that religion or who have no religious beliefs. The statutory pur-

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22. The evidence of legislative intent underlying the 1972 "religious accommodation" amendment points to an exclusively nonsecular, sectarian purpose. The provision arose as a floor amendment sponsored by Senator Randolph. 118 Cong. Rec. 705 (1972). The Senator's sponsoring remarks reveal that advancement of religion—specifically, those religions which observe the Sabbath other than on Sunday—was the sole purpose for which the amendment was offered.

> "I am sure that my colleagues are well aware that there are several religious bodies—we could call them *religious sects;* denominational in nature—not large in membership, but with certain strong convictions, *that believe there should be a steadfast observance of the Sabbath and require that the observance of the day of worship, the day of the Sabbath, be other than on Sunday.* On this day of worship work is prohibited whether the day would fall on Friday, or Saturday or Sunday. There are approximately 750,000 men and women who are Orthodox Jews in the U.S. work force who fall in this category of persons I am discussing. There are an additional 425,000 men and women in the work force who are Seventh Day Adventists.
>
> * * *
>
> I say to the distinguished chairman of the Labor and Public Welfare Committee, who manages this bill, that there has been a partial refusal at times on the part of employers to hire or continue in employment *employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days.* So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, *a dwindling of the membership of some of the religious organizations* because of the situation to which I have just directed attention.
>
> * * *
>
> *My own pastor* in this area, Rev. Delmar Van Horne, has expressed his concern and distress that *there are certain faiths that are having a very difficult time,* especially with the younger people and understandably so, with reference to a possible inability of employers on some occasions to adjust to work schedules to fit the requirements of the faith of some of their workers." 118 Cong. Rec. 705 (emphasis supplied).

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pose to foster religion and, in particular, certain sects could not be clearer.[23]

Moreover, unlike *Nyquist,* the legislative history of the accommodation requirement does not reveal any attempt whatsoever to demonstrate a secular legislative purpose. Thus, the only available history should be taken to mean what it says—that the accommodation requirement was meant to directly aid religion. *Meek* v. *Pittenger, supra* at 363; *Sloan* v. *Lemon,* 413 U.S. 825, 829-30 (1973); *Nyquist, supra* at 773; *Hunt* v. *McNair,* 413 U.S. 734, 741-42 (1973); *Tilton, supra* at 678-79 and *Lemon* v. *Kurtzman, supra* at 613. Nor is there any indication that the original prohibition against religious discrimination in Section 703 (a)(1), assuming arguendo the constitutionality of that ban, required any supplementary legislation to reach acts of intentional discrimination or other invidious forms of religious discrimination. The congressional intent to place "an imprimatur" upon the Saturday worshiper is simply uncontradicted. *Gillette, supra* at 450; *Engel, supra* at 430-31 and *Torasco, supra* at 495. Nor do *McGowan, Gillette, Griggs, Sherbert* or *Walz* support any *sub rosa* secular legislative purpose. Actually, the language of the statute and guidelines indicate that the accommodation requirement

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Time and again, Senator Randolph stressed his objective—to benefit Saturday Sabbatarians.

> "Mr. President, I am a member of a denomination which is a relatively small one, The Seventh-Day Baptists. Perhaps there are only 5,000 individuals within that denomination in the work force. I do think it is important for me to say that within the groups that I have mentioned, we think in terms of our observance of the Sabbath beginning at sundown Friday evening and ending at sundown Saturday evening, following the Biblical words, 'From eve unto eve shall you celebrate your Sabbath.' I make this statement only by way of explanation of the groups I have just mentioned." (118 Cong. Rec. 705-706).

23. 62 Va. L. Rev. 237, 255 and 45 U.M.K.C. L. Rev. 56, 71.

applies only to religious believers as opposed to nonbelievers.

### B. The Primary Effect of the Accommodation Requirement Is to Advance Religion.

The foregoing legislative history and the express language of the 1972 amendment and 1967 guidelines demonstrate that a direct effect is to advance religious beliefs. Application of the requirement also advances religion. Indeed, no other effect can be perceived other than to either "aid all religions" or to "prefer one religion over another." *Walz, supra* at 670 and *Everson, supra* at 15. Illustratively, the accommodation requirement, as construed by the court of appeals, gave Hardison special preference *solely* because of his religion. A private employer must develop artificial classification bearing no relationship to any job requirement, qualification, merit or already existing uniform work rule but rather one that stems solely from Hardison's religious beliefs. Unlike *Walz, supra*, there is no broad class of beneficiaries receiving a historically acceptable benevolent benefit. Nor is there any comparable preferential treatment for the nonreligious employee or the employee who simply has a strong need and belief to remain with his family on weekends.

Not only does the requirement extend benefits solely to religious believers but also it places the burden of accommodation upon the employer (and other employees) who may well have contrary religious beliefs. Thus, while the religious taxpayers in *Walz* had standing to attack a broad tax exemption, the impact of the exemption was not as immediate or real as that the employer experiences in bearing the burden of accommodation without *undue* hardship. Illustratively, a direct out-of-pocket cost is plainly contemplated by the court of appeals (A. 258). Similarly,



unlike *Tilton, supra*, the aid here is ideological in character in that it specifically furthers religious observances.

The above difficulties are compounded by the TWA-IAM bona fide seniority provision which creates extra burdens for the employer as well as bringing into play the contractual rights of other employees. Hardison conceded that many of his fellow employees and union members regarded their seniority rights as preciously as he held his religious beliefs and that if he were allowed to bump out of seniority, it would necessarily mean that an employee who did not share his religious beliefs would be denied seniority rights (A. 114).

The court of appeals held that the accommodation requirement did not preclude "some cost" to TWA (A. 258). Surely, as the district court found (A. 244), to force others, whether it is the employer or other employees, to incur out-of-pocket costs is effectively requiring an employer to finance an employee's religious practices. The effect of advancing religion is achieved whether the payment, or "accommodation," is direct or indirect.[24] *Nyquist, supra*.

This Court has consistently invalidated legislative schemes whose benefits have flowed "*primarily*," much less the exclusive type involved here, to the parents of children attending sectarian schools. *Nyquist, supra* at 794 (emphasis added).

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24. As noted in footnote 7, *supra*, it is not clear from the record that Hardison's religion would not share in any award he might receive in this litigation but it is clear that religions could encourage members to take advantage of the accommodation requirement to help assure larger church attendance and correspondingly fuller collection plates. See also 51 Notre Dame L. Rev. 481, 491 (1976), *supra* and 45 U.M.K.C. L. Rev. 56, 72-73.

### C. The Statute and Guideline Patently Require Pervasive and Excessive Government Entanglement With Religion.

In reviewing the reasonable accommodation requirement, one question is whether government involvement requires an "official and continuing surveillance leading to an impermissible degree of entanglement," *Walz, supra* at 675. See also *Lemon* v. *Kurtzman*. Unlike the long history demonstrating that no excessive government entanglement had occurred in *Walz*, the accommodation requirement has already resulted in a sustained and detailed administrative entanglement with religion. Thus, the reasonable accommodation requirement reaches *"all aspects of religious observance and practice as well as belief."* Section 701(j), 42 U.S.C. § 2000e(j) (emphasis added). Consequently, those enforcing the requirement will necessarily weigh and determine whether an individual has a religious belief, whether it is sincerely held and how that belief is manifested in the employment relationship.[25]

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25. Senator Randolph contemplated—and endorsed—precisely such involvement, as witnessed by the colloquy accompanying his introduction of the 1972 amendment:

> "Mr. Dominick. Am I correct in understanding that the amendment allows *flexibility* both to the EEOC and to its investigators to determine whether or not any particular group of religious adherents are having their customary observance of their religious activities unduly interfered with? *In other words, flexibility is provided so that someone could make a discretionary judgment on it?*
>
> Mr. Randolph. The Senator from Colorado correctly follows me in the thinking that I have placed in the language of the amendment that *there would be such flexibility*, there would be this approach of understanding, *even perhaps of discretion*, to a very real degree. 118 Cong. Rec. 706 (1972)" (emphasis supplied).

Such "flexible" and "discretionary" bureaucratic judgment will inevitably give rise to the danger of "erratic decisionmaking" which this Court has previously identified as a primary source of improper entanglement. *Gillette* v. *United States*, 401 U.S. at 458.



The entanglement does not cease upon a determination that bona fide religious practices are present because then the government must determine whether a private employer can "reasonably accommodate" without "undue hardship." Not surprisingly, the EEOC has promulgated extensive, and oftentimes contradictory, guidelines attempting to define the duty imposed upon the employer. Those guidelines affect all employees as well as the employer. The government is thus inextricably involved in serious and practical day-to-day work scheduling problems for employers and labor organizations. Moreover, the role of the government has, in actual practice, entailed far more than a simple judgment by the EEOC or the courts (A. 237). The notion that any type of sterile judgment can be made is belied by the number of times that federal judges have disagreed as to what factually constitutes "reasonable accommodation" and "undue hardship."[26] Moreover, the nature of zealously

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26. The following decisions involve reversals of district court findings and opinions in the religious discrimination area. *Dewey* v. *Reynolds Metals Company*, 429 F.2d 324 (6th Cir. 1970); *Riley* v. *Bendix Corporation*, 464 F.2d 1113 (5th Cir. 1972); *Reid* v. *Memphis Publishing Company*, 468 F.2d 346 (6th Cir. 1972) and 521 F.2d 512 (6th Cir. 1975), *cert. denied* November 15, 1975, No. 75-1105; *Young* v. *Southwestern Savings & Loan*, 509 F.2d 140 (5th Cir. 1975); *Cummins* v. *Parker Seal Company*, 516 F.2d 544 (6th Cir. 1975); *Reid* v. *Memphis Publishing Company*, 521 F.2d 512 (6th Cir. 1975); *Draper* v. *U. S. Pipe & Foundry*, 527 F.2d 515 (6th Cir. 1975); and *Hardison* v. *Trans World Airlines, Inc.*, 527 F.2d 33 (8th Cir. 1975). Compare with *Cooper, supra*. See also *Roberts* v. *Hermitage Cotton Mills*, 8 E.P.D. ¶ 9589 (4th Cir. 1974); *Johnson* v. *United States Postal Service*, 497 F.2d 128 (5th Cir. 1974); *Williams* v. *Southern Union Gas Co.*, 529 F.2d 483 (10th Cir. 1976), *cert. denied* November 15, 1976, No. 75-1511; and *United States* v. *City of Albuquerque*, 9 E.P.D. ¶ 10,182 (D. N. Mex. 1975), *aff'd* ..... F.2d ....., 12 E.P.D. ¶ 11,244 (10th Cir. November 29, 1976). These latter cases represent instances where the district court findings were upheld and each case is strikingly similar factually to the facts presented in this case.

*Draper* is apparently the most recent of the widely differing Sixth Circuit opinions concerning Title VII religious discrimination cases. The court reversed the district court and held for the employee upon the supposed basis of clearly erroneous find-

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held religious beliefs is such that in some minds an accommodation must be made. By the same token, what may be a very real undue hardship to the employer may seem remote to those not involved in the day-to-day work process. Under such circumstances, the fairness or bias of governmental decision makers is a matter of concern which can lead to strife as well as cynicism for the respect owed government institutions.[27]

Competition among religious sects for political and religious supremacy has generated considerable civil strife throughout history as a result of efforts to maintain or secure the support of government. *Everson, supra.* The accommodation requirement is ripe with the potential to ignite dissension among employees over another employee's special treatment. For example, TWA cannot contractually require overtime unless an emergency exists (A. 216). Yet, the court of appeals would characterize Hardison's Sabbath observance as an "emergency." The work force would become a prime target for strife if one employee's religious beliefs are any more of an emergency than, for example, the opening of trout season. Thus, this is the type of gov-

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ings by the district court. Judge Engel strongly dissented by setting forth the district judges' findings of fact which actually discussed the factual concern of the two-judge majority. He found it a "surprise" that the findings could be deemed clearly erroneous and stated on page 524: "What makes the district court's findings here so especially entitled to credit is the fact that there is absolutely no suggestion of religious bias or prejudice in the record. Draper was a valued and greatly needed employee who enjoyed a close friendship with the man who finally discharged him. These additional circumstances strongly support a finding that the company was willing to and did undergo considerable hardship in order to retain him. This is not a case where Draper's discharge was pretextual, masking a latent bias against his faith or against him for adhering to it."

27. See, for example, Rabinowitz, "The Bias In The Government's Anti-Bias Agency", Fortune, Vol. XCIV No. 6, December, 1976.



ernment involvement that is "apt to lead to strife" (*Walz, supra* at 716 [Opinion of Harlan, J.]).

The court of appeals ignored the potential strife that could result from employee morale and grievance problems (A. 258, 261). That approach is improper because the Establishment Clause was intended to prevent the outbreak of dissension and strife as well as the government's exaction of money from private persons solely for the benefit of another person's religious practices.

The seriousness of a breach of the Establishment Clause has never been equated with "the number of people who complain," *Abington School District, supra* at 264 (opinion of Brennan, J.) or the imposition of only "some cost."[28] Nor did it matter in *Engel, supra* that the amount of time for school prayers was small or that few complaints were made.

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28. Mr. Justice Black stated in *Everson, supra* at page 16, that:

> "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, whatever form they may adopt to teach *or practice religion.*" (Emphasis added).

See also *Abington School District, supra* at page 230 (opinion of Douglas, J.).

The writings of James Madison have also been noted concerning State requirements leading to "some" cost:

> "That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." 2 Writings of James Madison 186 (Hunt ed. 1901) as cited by Douglas, J. in his dissent in *Allen* v. *Board of Education*, 392 U.S. 236, 266 (1968) and *Everson, supra* at 40 and 63 (dissent by Rutledge, J.).

The large number of amicus briefs filed in these cases demonstrates that adherents of various faiths take strong positions. *Walz, supra* at 670. Religious groups should, however, "spread their faith" without government aid or entanglement problems. *McCollum, supra* at 210. See also *Everson, supra* at 27 (dissent by Jackson, J.).

This Court has always warned that even relatively minor encroachments of the Establishment Clause may become major. As stated in *Abington School District* at 225:

> "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'It is proper to take alarm at the first experiment on our liberties.'"

## II. The Court of Appeals Imposed a Far Too Strict and Unrealistic Standard and It Violated Rule 52(a) by Trying the Case de Novo.

The exceedingly strict standard imposed upon TWA by the court of appeals is far too severe. Moreover, the court of appeals followed a prevalent, but unwarranted, pattern in Title VII religious discrimination cases of violating the clearly erroneous provision of Rule 52(a) Fed.R.Civ.P. by trying the matter *de novo*.[29] Such a *de novo* procedure needlessly embroils courts of appeal in an unwise expenditure of the already too scarce commodity of judicial time. Litigants should be assured that the court that actually observes witnesses will decide credibility matters and that such decisions will be respected by the appellate court, particularly in cases concerning the terribly sensitive area of accommodation of another person's religious beliefs. Accordingly, this Court should exercise its supervisory powers to facilitate the proper judicial administration of the fundamental but differing roles of the appellate and trial courts by reinstating the district court's findings.

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29. Instances of courts of appeal making "clearly erroneous" findings are collected in footnote 26, *supra*. Because of the use of "overzealous" standards and the distinct tendency to embark upon *de novo* trials, the widely varying court decisions have not received critical acclaim. See, for example, the law review commentaries cited in footnote 10, *supra*.



The factual errors made by the court of appeals render it difficult to extract a definable standard, but this much is certain—it is virtually impossible for an employer to demonstrate that an actual accommodation without undue hardship could not be made, particularly if the employer is large. The term "reasonable" was read out of the statute. A strict standard of discrimination by effect was applied notwithstanding the applicability of a bona fide collective bargaining agreement which the union refused to vary; the reality of overtime costs (if overtime could even be obtained); work coverage and scheduling problems; employee morale and grievance problems; the special needs caused by TWA's continuous operation requirements; Hardison's frustrating voluntary transfer; the rights of other employees and the absence of any intent to discriminate or the presence of TWA's good faith effort to find a solution. The court of appeals is simply out of touch with the reality and needs of a secular industrial work force.

Judge Oliver held that the duty to accommodate did not require an employer to make every effort short of going out of business to permit his employees to stay on the job and also to observe their religion. In his view, "*reasonable* accommodation" . . . should be read with the term "undue hardship" (emphasis original) to arrive at the proper standard (A. 240). In fashioning that "proper standard," Judge Oliver found that the duty imposed upon employers or unions by Title VII was not, "a duty to impose hardships on the rest of his employees or members to accommodate the religious beliefs of a few" (A. 241). TWA's duty was to, "take affirmative action to try to find a way to permit the employee to observe his religion as he wishes, *as opposed to a duty simply not to intentionally discrim-*

*inate*" (A. 241, emphasis added).[30] Similarly, Hardison's voluntary transfer was viewed only "as a frustration of TWA's attempts to accommodate . . ." and not as an action which relieved TWA of its duty to seek further accommodation (A. 243). Judge Oliver also took cognizance of TWA's continuous operation requirements (A. 244) as well as understanding the problem of accommodating all employees as to their individual religious beliefs (A. 240). He rejected the concept of requiring TWA to incur overtime wages or leave other work areas uncovered because Title VII ". . . cannot be interpreted to require that companies finance employee's religious beliefs" (A. 244). He also found that the seniority provision prevented further accommodation and that in the "circumstances of this case" no violation of that provision was required (A. 228, 244). Finally, Judge Oliver referred to Title VII, 42 U.S.C. § 2000e-2(h) which permits differential treatment of employees, "based upon a bona fide seniority system" (A. 245). The seniority system was not designed to discriminate against religion nor did it act to lock members of any religion into a discriminatory pattern (A. 228, 229, 245).[31]

The court of appeals attempted to ignore the conflict created by the seniority system (A. 259-260). It, however, overlooked the express intent of Congress to exempt bona

30. The thrust of any valid congressional intent to avoid real religious discrimination could be effectively handled without the strict "effect" test applied by the court of appeals. Here, TWA had no intention to discriminate and it took much good faith affirmative action. No more should be required. See Edwards and Kaplan, *supra* at 637-641.

31. The district court's standard provided for union liability in an appropriate circumstance relating to the union's duty of fair representation (A. 221-232). That standard is a reasonable one and, from the employer's view, the union ought to be a mutual and equal partner in accommodating employee religious beliefs. Unilateral action by the employer is not desirable or reasonable.



fide seniority systems from the overall proscription of Title VII when it provided in Section 703(h):

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply * * * different terms * * * pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin * * *" 42 U.S.C. § 2000e-2(h) (1974).

Given the nondiscriminatory intent of TWA and the union and the applicable seniority system, TWA cannot be deemed guilty of religious discrimination unless the above language is rendered meaningless surplusage.[32] Moreover, in a collective bargaining environment in which the three concerned parties—TWA, Hardison and the union—all perceived in good faith, that any accommodation was limited by the collective bargaining agreement, whether an accommodation could be made is a finding of fact that is properly within the province of the trial court and should not be

32. TWA's position is consistent with *Franks, supra*, because no past pattern of discrimination is present and no "making whole" problems are involved. TWA's position is also consistent with *Dawson* v. *Mizell*, 325 F. Supp. 511 (E.D. Va. 1971) (no duty to override on part of Postal Service collective bargaining agreement covering 700,000 employees); *Johnson* v. *United States Postal Services*, 364 F. Supp. 37 (D.C. Fla. 1973), *aff'd* 497 F.2d 128 (5th Cir. 1974) (no duty to override). Compare with *Drum* v. *Ware*, 7 E.P.D. ¶ 9244 (W.D. N.C. 1974) and *Shaffield* v. *Northrup Worldwide Aircraft Services, Inc.*, 373 F. Supp. 937 (M.D. Ala. 1974) where efforts to swap were successful or else no efforts to accommodate were even attempted. The *Shaffield* court stated, at 942, that, "In some cases the existence of a seniority agreement might limit the freedom of an employer to effect the necessary reasonable accommodation." Similarly, in *Claybaugh* v. *Pacific Northwest Bell Telephone Company*, 355 F. Supp. 1, 6 (D.C. Oregon 1973), unlike here, no "union cooperation in solving this problem which affects both organizations" was explored.

second-guessed by the court of appeals. *Yott, supra* and *Cooper, supra* at 177 (opinion by Rives, J.). Thus, Judge Oliver's findings should have been accepted because there is no basis in the record to overturn them.

Application of Judge Oliver's proper standard to religious discrimination cases provides a far more workable and realistic standard than the court of appeals' overzealous approach. When coupled with the proper application of the clearly erroneous requirement of Rule 52(a), Judge Oliver's standard would have the salutary effect of providing a more uniform consideration of the elements heretofore deemed important, such as: (i) the fact that accommodation connotes a mutuality of effort on the part of the concerned employee to seek or, at the very least, not to frustrate an accommodation, *City of Albuquerque*, 9 E.P.D. ¶ 10,182 (D. N. Mex. 1975), *aff'd* ..... F.2d ....., 12 E.P.D. ¶ 11,244 (10th Cir. November 29, 1976); (ii) that employers must affirmatively seek union cooperation in finding a solution, *Claybaugh* v. *Pacific Northwest Bell Tel. Co.*, 355 F. Supp. 1, 6 (D.C. Oregon 1973); (iii) the consideration of an employer's own needs, particularly for "specialized" jobs or ones that require a flexible employee, *Reid, supra; Johnson* v. *United States Postal Service*, 497 F.2d 128 (5th Cir. 1974), *aff'g* 364 F. Supp. 37 (N.D. Fla. 1973); *Roberts* v. *Hermitage Cotton Mills*, 8 E.P.D. ¶ 9589 (D. S.C. 1974), *aff'd* 8 E.P.D. ¶ 9597 (4th Cir. 1974) and *United States* v. *City of Albuquerque, supra;* (iv) the imposition of hardships upon other employees including grievances and morale problems, *Williams* v. *Southern Union Gas Co.*, No. 75-1511, 529 F.2d 483 (10th Cir. 1976), *cert. den.* November 15, 1976; *Reid, supra; Kettel, supra;* (v) the applicability of bona fide seniority requirements, *Dawson* v. *Mizell*, 325 F. Supp. 511 (E.D. Va. 1971); and (vi) the ability to continue a once successful



accommodation, *Cummins, supra.*[33] All of the foregoing factors were carefully considered by the trial court.

There was no basis for the court of appeals determining that the district court's findings were clearly erroneous[34] and relegating TWA to the role of a "Pontius Pilate" (A. 254). The evidence is to the contrary. The people involved set out to assist Hardison as best they could within the confines of TWA's obligations to its other employees, its relationship with the union and its own reasonable work needs.

Kussman met with Hardison on three separate occasions (the union was present at two of the meetings) in an attempt to find solutions (A. 80, 117-123, 126-127). Kussman initiated one of the meetings after he, not Hardison, observed a work schedule requiring Hardison's presence on a Saturday (A. 69-72, 76, 126-127); TWA also granted, with union consent, Hardison special days off for unique religious holidays (A. 28-31, 81-82, 108); TWA's efforts in seeking swaps or job trades proved unavailing because Hardison's day off requirements were too "difficult to handle" and no one would "swap days off with him" (A. 28); TWA sought to accommodate by consenting to a variance of the seniority agreement. The union, however, would agree only to job swaps or trades that could be accomplished within the framework of seniority (A. 70, 77-78, 127); TWA authorized the union to search for a swap

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33. For review of other factors or requirements that have been considered relevant see the authorities cited in footnote 10, *supra*, and in particular 54 Tex. L. Rev. 616 (1976), *supra*; 9 Creighton L. Rev. 795 (1976), *supra;* and 45 U.M.K.C. L. Rev. 56 (1976), *supra*.

34. The court of appeals realized that the issue was one of whether the district court's findings were clearly erroneous (A. 251). The court of appeals simply "disagree[d] with both conclusions [reasonable accommodation and undue hardship]" (A. 256).

of shifts and it was the union steward's task to do so (A. 70, 77-78, 126-127, 157, 158, 238-245); and, at no time, did TWA express any animus toward Hardison's religious beliefs (A. 41).

Hardison recognized and appreciated TWA's efforts because on two occasions he wrote Kussman expressing thanks, ". . . for your sincere and understanding consideration and cooperation" (A. 28-29) and that, "I would like to thank you again for your sincere understanding and cooperation in this matter" (A. 29-31).

After observing and judging the credibility of the witnesses who were "on the line handling the problem" (R. 474), Judge Oliver found that, in sharp contrast to cases where no affirmative action was taken by the employer, "TWA established as a matter of fact that it did take appropriate action to accommodate as required by Title VII" (A. 243). The court of appeals' holding to the contrary, is a prime example of an appellate court trying a case *de novo* in contravention of Rule 52(a).

The court of appeals, in its *de novo* trial, somehow found, although it was not contended at trial, that TWA had accommodation alternatives available to it outside the restrictions of the seniority agreement (A. 259-263). That assertion ignores Hardison's own admission that if he were allowed to "bump out of slot," it necessarily would have meant that an individual who did not share his religious beliefs would be deprived of seniority rights (A. 114). Similarly, the granting of time off would be "usurping seniority" in another section (A. 125, 128). TWA simply could not require a senior employee to work in place of a junior employee and there were no circumstances under which job trades were made that disregarded seniority (Tr. 105, 137-143, 139, 210-217). Given such a record and having heard Kussman testify that he could "not require someone else to work in [Hardison's] place" (A. 135), Judge Oliver's finding that any further type of accommodation was not available (A. 243-245) cannot be deemed clearly erroneous.



The court of appeals asserted that three closely related alternative accommodations conceivably could have been made. First, TWA "could have permitted Hardison to work a four-day week" (A. 256). Second, TWA "could have" filled Hardison's job by "holding over", or "calling in early" another worker or "assigning" a worker from a "pool of 200 employees" even though overtime costs would be incurred (A. 258). Third, a "swap" could have been made (A. 259). Those "alternatives" are in direct conflict with Judge Oliver's findings. Mr. Kussman testified, without contradiction, that he could not simply permit a four-day work week because he needed regular employees and he had to avoid depriving other areas of work coverage or "usurping seniority" (A. 125, 127-128, 146, 153, 157, 244). Furthermore, the court of appeals ignored TWA's need to have a worker on Saturday. TWA's ability to "holdover", "call in early" or otherwise fill Hardison's job was constrained by its contractual agreement that:

> ". . . at overhaul bases, every reasonable effort will be made to arrange work schedules to allow Saturday and Sunday as regular scheduled days off . . .
>
> * * *
>
> Except in an emergency, an employee will not be required to work overtime against his wishes" (A. 215-216).

Because of the above contractual requirement and the general preference of high seniority employees not to work weekends (A. 104), it was necessary to have a regularly

scheduled employee available for Saturday work. Kussman could not be assured of getting overtime under any of the alternatives because of the emergency overtime clause and, if he did get overtime, it would be at premium wages (A. 125, 126, 128, 134, 135, 142, 216). Further, the undisputed evidence is that the need for an employee in Hardison's position was not like turning on and off a water tap because TWA's entire system had to be based on immediate responses to emergency situations (A. 75, 116, 125, 143, 153-156, 160-162). Otherwise, there would be no need for three shifts per day, 24 hours per day, 365 days of the year.[35] Moreover, the idea of forcing employees to resort to such hit and miss techniques to fill its jobs was rejected in *City of Albuquerque, supra.*

The court of appeals attempted to buttress its erroneous factual view by asserting that Hardison's need for accommodation was only for the temporary period of Wyatt's two-week vacation (A. 257). There is no evidence to support that position.[36] For example, the court of appeals con-

35. Common sense would seem to dictate that if a part-time worker were needed, a part-time worker would have been hired.

36. Hardison's problem was permanent and did not lessen when the junior man returned from vacation. Hardison's charge of employment discrimination recited that he was scheduled to work on his Sabbath when Wyatt left only for a two week vacation (A. 7). Hardison's own counsel elicited the testimony that Hardison was to replace Wyatt only on March 8 and March 15 (A. 69). Hardison did not report to work as scheduled on the next Saturday, March 22. Further, Hardison transferred to a twilight shift from which he left work after sundown on Friday, March 28, 1969. *A fortiori* if his problem was only because of the two week vacation, Hardison would not have transferred shifts. There was no doubt in the union's mind that Hardison simply was never going to work on a Saturday and that he had a "permanent problem, not a temporary problem" (A. 170-171 and 178).

The district court made the following explicit finding:

"After the meeting, but before the discharge hearing, Plaintiff changed his shift to the twilight shift, which permitted

*(Footnote continued on following page)*



tradicted its own suggestion by its subsequent assertion that Hardison's shift transfer (after missing *three* Saturdays) to the twilight shift would have reduced the accommodation impact upon TWA's operations (A. 257). The suggestion ignores the fact that Wyatt was no longer on vacation after Hardison missed the first two Saturdays or after Hardison's transfer. Moreover, the asserted reduction of impact ignores the foregoing facts concerning the need to have an available worker as well as the realities of industrial plants such as TWA's overhaul base.

Contrary to the court of appeals mistaken belief, TWA made attempts to secure a "swap". The district court's findings on that issue are amply supported (A. 238-243). For example, it was TWA that initiated meetings to find a solution and agreed to waive the seniority provision (A. 70, 71, 110-112, 125-216, 145-146). The union, however, refused to violate the seniority rights of other employees. In Hardison's own words, the union "stipulated that [any swap or change] had to be through the seniority system" (A. 108) and that the union would allow a changing or swap of shifts only if, "I could bid into something else" (A. 111). As noted above, the record is clear and in-

*(Continued from previous page)*

him to have Saturdays off. The testimony was that the union believed at this time that its problems were solved (Tr. 391). But on March 28, 1969, Plaintiff quit work at sundown and it became immediately apparent that the union would not be able to argue that Plaintiff should not be dismissed because his conflicts had been resolved (Tr. 391-392)." (A. 230).

Significantly, nowhere in Hardison's suggested findings of fact was it argued that his problem was a temporary one (Tr. A. 82-113). See footnote 4, *supra*. Moreover, it if were only a temporary problem, surely Hardison could have worked as he voluntarily did for premium overtime pay after he first told Kussman in April of 1968 that he "sincerely believed" no work could be done on his Sabbath (A. 28, 74).

disputable, as Hardison conceded, that a "swap" was subject to the seniority rights of other employees and that if he bumped out of slot, employees not sharing Hardison's religion would be deprived of seniority (A. 114).

Despite TWA's seeking union help, the court of appeals construed TWA's contact with the union as, "clear that TWA did not seek and the union, therefore, did not refuse to entertain a possible variance" (A. 260-261). With all due respect, it is surely an Alice-in-Wonderland world where words and actions have no meaning if TWA's conduct is construed as anything other than seeking a variance for Hardison.

The district court, on the other hand, found that, ". . . this case is a perfect example of a situation in which *a union* could accommodate a member if required to do so. *TWA agreed* that plaintiff could change shifts if the union approved" (A. 224, emphasis added).

Moreover, the court of appeals requires TWA "* * * to find one [a swap] or obtain union approval" (A. 259, n. 10). It is evident that nothing would comply with the court of appeals' standard short of an actual accommodation.

The court of appeals also implies that TWA should not have relied upon the union steward to seek any possible job swap (A. 259). In reality, TWA, like most other large industrial employers, must rely upon the union to align seniority rights with the work schedule (A. 106, 127, 138, 158). The steward performs such tasks to avoid any element of employer coercion in respect to "voluntary" job swaps or shifts. Unions and management are both rightfully hesitant for management to be in the position of



coercing trade-offs. See, for example, *City of Albuquerque, supra.*[37]

The court of appeals is also factually mistaken in its reference to the Union Relief Committee (A. 261). That committee dealt only with temporary, not permanent, problems (A. 143-145, 170-171, 180). Further, that committee is not, in any sense, governed or run by TWA (A. 121). It would be Hardison's or the union's responsibility to resort to the committee but there is no evidence that he did so. Compare with *City of Albuquerque, supra,* where the court sanctioned the concept that the concerned employee must seek his own trades.

The court of appeals erroneously implies that TWA had not accommodated other employees with similar religious problems (A. 261). While Hardison was the only case in the Stores Department (A. 141), TWA had been able, as the district court so found, to accommodate other such problems in the same manner as it approached Hardison's problem (A. 154).

The court of appeals misconstrued the record in finding that TWA conceded that there were over "200 available workers" (A. 256) and that TWA could have assigned a worker from that "pool" (A. 258). TWA made no such concession and the evidence belies the notion that any such "pool" existed. The number of employees scheduled to work on weekends was limited by the labor contract (A. 215-216) and employees with high seniority preferred not

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37. The *City of Albuquerque* decision is significant in that the district court relied upon Judge Oliver's opinion and, on appeal, the Court of Appeals for the Tenth Circuit did not follow the reversal of Judge Oliver's opinion by the Court of Appeals for the Eighth Circuit. Judge Oliver's opinion was also relied upon in *Dixon* v. *Omaha Public Power District,* 385 F. Supp. 1382 (D. Neb. 1974) and *Cook* v. *Mountain States Telephone and Telegraph Company,* 397 F. Supp. 1217 (D. Ariz. 1975).

to work on weekends (A. 104). Thus, on weekends, TWA had a greatly reduced work force of only four people on Hardison's shift (A. 156) and only 15 to 40 workers were in the entire job area (A. 120, 156). More importantly, Hardison was the only person scheduled to perform his essential job (A. 75, 125, 156). The number of 200 employees is really meaningless and one could just as well point a figure of 500 or, indeed, the 37,500 employees TWA had. In fact, the number 200 came about from a question by the district court which *assumed* that the strictures of the seniority system were not present (A. 134-135).

Again, the court of appeals erred in stating that the costs which TWA would incur from overtime is not "clear from the record" (A. 258). That assertion cannot stand in the face of the undisputed testimony that overtime would be one and one-half to double time and stipulation regarding the rates of pay (A. 21, 125 and 216).[38]

The court of appeals casts a deaf ear upon TWA's other employees who might have grievances resulting from Hardison being granted an unapproved union swap out of seniority (A. 261). The district court, however, found that it would have been an undue hardship for TWA, which was a party to a bona fide seniority system, to change plaintiff's shift in violation thereof (A. 244). The evidence supports Judge Oliver's finding because grievance and morale problems would arise (A. 159, 164). Moreover, TWA's employees regarded seniority as an important and serious right (A. 163) as evidenced by the number of seniority related grievances TWA receives (A. 163) and by some union members regarding seniority as being as important as religion (A. 114). The court of appeals dis-

38. Significantly, nowhere in Hardison's suggested findings of fact was it argued or suggested that the cost was not determinable from the record (Tr. App. 82-112).



agreed upon the ground that TWA had a large labor force and had not yet been "inundated with similar demands" (A. 257, n. 8).

A review of Judge Oliver's carefully conceived standard and his documented opinion indicates that it is a total "surprise" that his findings could be found clearly erroneous.[39] The court of appeals did not observe Hardison attempting to explain away his voluntary Saturday work at premium rates after he had told Kussman, ". . . *I sincerely believe* this is the Sabbath" (A. 28, emphasis added); his voluntary transfer to a shift more convenient to him; or his refusal to cooperate with the union in presenting a grievance on his behalf. Nor did the court of appeals have the opportunity to observe Mr. Kussman describe his respect and concern for Hardison's religious beliefs; his attempts to find a solution fair to all employees and yet preserve TWA's relationship with a union that would not violate the seniority agreement; his need to have someone on the job to be available in the event of emergencies; the difficulty of obtaining "emergency" overtime under the collective bargaining agreement and the need to have coverage in all work areas. Nor did the court of appeals see and observe Mr. Stone describe the need for uniformly applied work rules in TWA's large system, the chaos that would result if all religious beliefs were accommodated, the large number of grievances TWA incurred because of seniority and the needs of TWA's continuous business. Nor did the court of appeals observe the testimony of the other witnesses.

39. See the discussion in footnote 26, *supra* of *Draper*, *supra*. Compare the courts of appeal decisions in *Draper* and *Hardison* with the opposite approach of properly deferring to the district court findings expressed in *City of Albuquerque*, *supra*, *Johnson*, *supra* and *Roberts*, *supra*.

The court of appeals mistook its own duty. The proper duty of an appellate court was expressed by the court of appeals for the Tenth Circuit in *City of Albuquerque, supra*. In respect to a virtually identical factual context, that court of appeals stated:

> "We regard the trial court's several conclusions as to 'undue hardship', as well as its earlier determination of 'reasonable accommodation', to be essentially findings of fact. On review such should not be rejected unless they are clearly erroneous. In our review, such are not clearly erroneous and hence should be upheld.
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> • • •
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> . . . Under the facts and circumstances here present, if we reversed the trial court we would simply be substituting our best judgment of the facts for that of the trial court. This we should not do. Indeed we cannot." (12 E.P.D. *supra* at pp. 5764-5765.)

Finally, the most bizarre and contradictory aspect of the court of appeals' opinion is that the unions escape liability upon the highly technical ground that the briefs and oral argument were directed to the breach of duty by TWA (A. 263).[40] It was the unions, not TWA, who refused to vary the seniority agreement. There is no justice in holding TWA liable when it had no intent to discriminate and when it took affirmative action to accommodate.

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40. The unions filed responsive briefs and actively participated in oral argument before the court of appeals just as they are doing in this Court.



## CONCLUSION

For the foregoing reasons, Trans World Airlines, Inc., the petitioner, respectfully submits that this Court should reverse the judgment of the court of appeals, and remand with instructions that Hardison's complaint be dismissed without liability to TWA.

Respectfully submitted,

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